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Judicial self-governance in Albania

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JUDICIAL SELF-GOVERNANCE IN ALBANIA

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Introduction

After the collapse of the communist system Albania has had three different judicial councils. The first judicial council was established after the fall of communism in 1992, following the models of other post-communist countries in the CEE. The second judicial council was established by the 1998 Constitution, with the aim to strengthen and improve the existing council, to better defend it from political interference. Unfortunately, even this second council failed to achieve the mission granted and in 2018, with the new justice reform, a new judicial council was established. The three models of judicial councils that Albania has endorsed were based on the best European standards for self-governance drafted by different European rule of law forums. However, as this article will show, the success of having an independent and accountable judicial council, it is not just a matter of just following the best European models. Although, the European standards on the judicial council's composition and competence are important and preconditions to have an independent and accountable council, the success of the model implemented would be determined by local factors,

unwritten rules, reputation and legitimacy of the judicial council and the general level of respect of rule of law in the country.

This article will be divided into three parts. The first part will cover the status and constitutional mandate of the three judicial councils in Albania, by making a comparison of their composition and status and identifying some of the perils and threats faced by the judicial self-governance in Albania. The aim of this part is to draw some lessons learned from the failure of the two previous council, in order to avoid the repetition of the same mistakes, sometimes disguised as new problems. The second and third part it will be analyzed the current election of the members of the HJC and its activity, not only emphasizing the new mechanisms of guarantees that are in place, but also trying to show how the road towards legitimacy and sustainability of the judicial council is still full of challenges and threats.

1. Status and constitutional mandate of Judicial Council(s) in Albania: Searching for the right formula



The first judicial council in Albania was created after the fall of communism in 1992.¹In a similar fashion to other post-communist countries, this was an effort to enforce the rule of law² and redesign the judicial power by establishing new institutions that would govern this branch of power independently. The constitutional law of 1992 opted for a pluralist *ad hoc* model of judicial council that would decide on the status of both judges and prosecutors. The High Council of Justice (1992) was composed by the President of the Court of Cassation, Minister of Justice, General Prosecutor and 9 renown lawyers

and it was chaired by the President of the Republic. The High Council of Justice was the only authority deciding for the appointment, transfer, and disciplinary accountability of judges and prosecutors of the first instance and appeal courts³. However, the role of this body for the 1992-1998 period was not very much visible due to its lack of proper regulation⁴, infrastructure and other resources to be effective. The criteria for the election of the HCJ members were very broadly defined, leaving a vast space for maneuvers to the executive.⁵ As noted by Presheva et al, even in the case of Albania, the main reason for the lack of success of the first council can be attributed to the “premature introduction of judicial council without contextualizing them in terms of judicial culture and the overall status of the judiciary in the respective countries.”⁶ There was a lack of understanding of division of powers and judicial independence in the early nineties in Albania and the governance of the judiciary was poorly supported financially and administratively. To illustrate, in 1992 the Parliament appointed in the judicial council from

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- 1 For Some amendments and addition in the ‘Law on Some Constitutional Provision’, No. 7561, date 29.04.1992.
 - 2 P. Castillo-Ortiz, *The Politics of Implementation of the Judicial Council Model*, “European Political Science Review” 2019, No. 11, pp. 508–509.
 - 3 Article 15 of the Law “ On some main constitutional provisions” “The High Council of Justice is chaired by the President of the Republic and consists of the President of the Court of Cassation, the Minister of Justice, the General Prosecutor and 9 lawyers known for their skills, who are elected once every five years in the joint meeting of Court of Cassation and the General Prosecutor’s Office, without the right to immediate re-election. The High Council of Justice is the only authority that decides on the appointment, transfer and disciplinary responsibility of first instance judges, appellate judges and prosecutors. The manner of functioning and exercise of the activity of the High Council of Justice is determined by the regulation approved by it”.
 - 4 Its was delegated to the HCJ the right to enact a regulation that would define its way of functioning and the exercise of its activity (article 15 law , Nr.7561, date 29.04.1992) The 9 reknown lawyers were 3 from the rank of judges, 2 form the rank of prosecutors and 4 members where chosen by the Parliament 2 from the rank of attorney, 1 from the rank of academics an done rom the judiciary.
 - 5 Only in 1997 for the first time a detailed procedure for electing members of the High Council of Justice was established by law Nr.8234, date 27.8.1997
 - 6 Preshova, Denis, Ivan Damjanovski, and Zoran Nechev. “The Effectiveness of the ‘European Model’of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms.” *CLEER Paper Series 1* (2017)., pg 19

the rank of lawyers, two members of the current Parliament. Luckily, the Constitutional Court⁷ considered this unconstitutional, but it shows the level of understanding of rule of law and judicial independence. Moreover, the High Judicial Council was supported by the administration of the Cabinet of the President of the Republic, to organize meetings and all the other necessary administrative tasks, a clear symbol of the proper lack of division of powers. As reported there were even cases where the President himself had decided for the promotions, disciplinary measures and removals of judges without following procedure.⁸

The solution of the problems caused within and by the first High Council of Justice was seen in its abolishment and the creation of a new council. In 1998 the Constitution provided for the establishment of a new High Council of Justice with a new compo-

sition and scope of competences. The High Council of Justice was raised at the level of an independent constitutional institution for the first time⁹. With regards to its composition, the representation from the Prosecutor Office was dropped, and the HJC was exclusively covering issues related to the governance of the judiciary. To protect the Council from the intrusive political influence the new composition provided for a majority of judges, 10 out of 15 members.

Compared with the previous HCJ (1992-1998), the new HCJ had a broader spectrum of competences^{10,11} Moreover, for the first time the HCJ would be equipped with its own administrative structure composed by 15 employees¹². From the normative point of view the new High Council of Justice entailed all the features of a "euro-model judicial council."¹³ It had a constitutional status, composed by the majority of judges, had decision-making powers and

7 Constitutional Court, Decision nr.3, date 13.07.1992

8 See: Debatë kushtetuese : diskutimet e zhvilluara në mbledhjet e Komisionit Parlamentar për Hartimin e Projekt Kushtetutës, mars-shtator 1998, OSCE Presence in Albania, 2006 , Volum 2. pg.503.

9 Article 137 of the Albanian Constitution 1998. The legislator clearly devoted to the HCJ a special provision in the Constitution and carefully placed the HCJ in a separate section, distinguishable from the executive and legislative power

10 Apart from the appointment, transfer and disciplinary proceedings, the HCJ would be responsible for the professional and ethical evaluation of judges, verification of complaints against judges, the right to give its opinion on the number of judges that had to be appointed in each jurisdiction. Article 12 Law no. 8436, dt. 28.12.1998 " On the organization of the judicial system in the Republic of Albania); the right to be consulted with regards the division of territorial jurisdiction of the first instance court (article 11 i ligjit nr.8436); the right to be consulted on the number of the appellate courts, the right to organize and plan trainings for the continuous training for judges in cooperation with the Magistrate School article 20)

11 In the domestic literature the HCJ was not considered a pure judicial body, but rather an authority within the judiciary which builds the politics of the judiciary based on the needs of organizing and governing the judicial system. Omari Luan, Anastasi Aurela, "E drejta Kushtetuese", fq. 398.

12 The administrative structure of the Council consisted of the Chief Inspector, Deputy Chief Inspector, 4 judicial inspectors, two prosecutorial inspectors and 7 administration employees. The HJC inspectors would be " in charge of inspecting the courts of first instance and appellate courts to verify the complaints of citizens and institutions, inspect the organization of judicial services, to evaluate the professional skills of judges..the workload and the overall efficiency of the courts (Article 17 of the Law 8436)

13 Although there are reserved if this notion exists, Bobek and Kosar identify 5 key requirements of the JC euro-model: 1. It should have constitutional status 2. At least 50% of the members must be judges selected by their peers 3. JC ought to be vested with decision making and not merely advisory powers 4. A judicial council should have substantial competences concerning the career of a judge, including selection, appointment, monitor transfer dismissal and disciplining 5. Must be chaired either by the President/chief Justice of the Highest Court or the head of the State.

substantial competences in the field of the judiciary and was chaired by the President.

However, the case of the High Council of Justice (1998-2016) in Albania goes against literature reviews that considers the composition and the scope of competences as a remedy for independent, impartial and efficient judicial council¹⁴. Although the standards of an “euro model judicial council” are important and serve as first premises of self-governance, they are not enough and the success of the model will depend on how other fundamental principles of rule of law are respected, the general culture of judicial independence, formal and informal practices.

Even though it is hard to exhaustively summarize the causes that led to the malfunction of the HCJ 1998-2016, we can identify at least some factors which eroded the independence and strength that the Constitution granted to the HCJ.

Firstly, although constitutionalizing the judicial

council aims to put the council out of the reach of ordinary politics and prevent manipulation by the government¹⁵, a strong executive can still ways to diminish its constitutional status by legislation curbing the independence of the Council. For example, although the 1998 Constitution did not provide for a special role of the Ministry of Justice within the Council, the law on Judicial Council approved after the Constitution granted special powers to this *ex officio* member. More specifically, the law attributed to the Minister of Justice the exclusive competence to initiate disciplinary proceedings against a judge. The MoJ had also the right and discretion to propose the specific disciplinary measure and penalties against judges in these proceedings. Moreover, the law provided the establishment of an inspectorate within the Ministry of Justice, that would inspect judges of the first instances and appellate courts. Although the statutory regulation beyond the Constitution was highly criticized by the community of judges,¹⁶ the Constitutional Court¹⁷ at the time did not see any constitutionality problem and just merely advised

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- 14 Garoupa, Nuno, and Tom Ginsburg. “Guarding the guardians: Judicial councils and judicial independence.” *The American Journal of Comparative Law* 57, no. 1 (2009): 103-134. Guarnieri, Carlo. “Judicial independence in Europe: threat or resource for democracy?” *Representation* 49, no. 3 (2013): 347-359. Castillo Ortiz, Pablo José. “Councils of the judiciary and judges’ perceptions of respect to their independence in Europe.” *Hague Journal on the Rule of Law* 9, no. 2 (2017): 315-336.
- 15 Garoupa, Nuno, and Tom Ginsburg. “Guarding the guardians: Judicial councils and judicial independence”, cit.supra, pg 27,; see also Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies; https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 (20.09.2020).
- 16 The President of the Supreme Court, considered it unacceptable that the Minister of Justice himself could do court inspections through its inspectorate. According to him the inspection of judges could be done by bodies that have in their composition at least a person with the status of a judge, but not by public civil servant of the executive. Kondi, Thimio “Probleme aktuale të reformimit të sistemit të drejtësisw- arrijtje e perspektiva. Roli i Konferencës Gjyqësore Kombëtare. In Ryederl-Lahey, Kosta, Vangjel, Gogu Toni. Administrimi i Gjykatave. 2005. Pg. 22
- 17 The Constitutional Court considered that the rationale of this power granted to the MoJ was to prevent corporatism in a Council dominated by judges, since there were 10 judges out of 15 members within the Council. This power granted to the MoJ was considered even by the Constitutional Court as “an equilibrium between powers, that prevents any branch from exercising unlimited power. Constitutional Court No.11, date 27.05.2004.

the legislator to revise and disentangle the statutory provisions on the two inspectorates.¹⁸

Secondly, the input legitimacy, *i.e.* the formal and informal practices of appointment of the members of the judicial council affects its independence, accountability and credibility. In the case of the 1998-2016 Judicial Council in Albania the minimum of votes required by law to choose the members of the Council- 36 votes out of 140 seats-, made it possible for the ruling party to appoint its own favorites without the consent of the opposition or despite their resistance. This low thresholds of votes coupled with vague, opaque and open ended criteria¹⁹ for the candidates chosen by the Parliament, gave this body and the executive free rein to pick its members, a formula which did not guarantee much independence and transparency.²⁰ Moreover, although the members appointed by the Parliament were not required to be judges, only renown jurists, the Parliament set an informal practice to appoint judges to the HCJ²¹, encouraging flirting between the judiciary and the executive/ruling party as this was seen as a

way of promotion to the judicial governing structure. This also ruined the balance between judges and lay members and the pluralism required by the Constitution. Moreover, there were cases where the opposite mechanism, the “stick” instead of the “carrot” was used by the Parliament to control the Council. There were cases when the Parliament would threaten or even remove its members in the Council, especially when there was a change in power²², creating the pressure to the HCJ members that they should be careful to the sensitivity and interests of the political parties.

On the other hand, the elections of the judges by their peers themselves was not far away from political influences. The Law on the National Judicial Conference did not stipulate and regulate the procedure or criteria for the election of judges in the HCJ. Lobbying of judges within the National Judicial Conference was not regulated at all, leaving an ample space for different influences and methods of operations. Lobbying within the NJC was perceived not only as time consuming and difficult financially, but

18 Decision of the Constitutional Court No.11, date 27.05.2004.

19 The law provides that appointments be made on the basis of objective criteria including “university performance, duration of practice as a lawyer, professional performance, post-graduate training, as well as any other objective data that show the superiority of one applicant over other candidates.” law on the organization of the judicial power in the Republic of Albania art. 22, Law No. 8436, 33 Official Journal. 1265-75(1998), as amended by Law No. 8546, 31 Official Journal. 1210-12 (1999) and Law No. 8656, 24 Official Journal. 1256-58 (2002)

20 This method of appointment was criticized and made subject for recommendation also in the GRECO Report, Fourth Round of Evaluations Greco Eval IV Rep (2013) 9Epublished 27 June 2014, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4\(2013\)9_Albania_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/GrecoEval4(2013)9_Albania_EN.pdf), par. 75

21 ABA CEELI. Promoting Rule of Law. Judicial Reform Index for Albania. 2004, Volume II, ISBN: 1-59031-402-6, pg.8.

22 Bjanku Florjan. Ndikimi i ndryshimeve kushtetuese në rolin e Këshillit të Lartë të Drejtësisë për garantimin e pavarësisë së gjyqësorit. In “Punime akademike mbi nevojën për ndryshimet kushtetuese.” ALTRI 2015 Pg. 100.

also as a process giving priority to those members who had a political affiliation or support.²³The lack of a clear, transparent process of selection of candidates for HJC by their own peers and the lack of system of objective evaluations, made the process prone to undue influences.

Thirdly, in a highly politicized environment the judiciary cannot escape political influences. In fact, although most members in the council were judges (10 out of 5), and in principle judicial independence in the second council should have been stronger, in reality, the council's agenda was often influenced by the two political ex officio members, the Minister of Justice and the President of the Republic. There were numerous cases where the Minister of Justice

abused their right to initiate proceedings, either suspending proceedings for no reason²⁴, or initiating a politically motivated disciplinary proceeding. Moreover, since the Ministers of Justice usually were changed very frequently, this paralyzed the work of HCJ, especially during political campaigns.²⁵ Moreover, the presence of the President of the Republic, who was also the Chair of the Council was influential in the Council meetings. The discretion of the President to refuse the appointment of judges proposed by the HCJ, without giving any reasons for his decision²⁶ the power he had to promote judges in the High Court and the Constitutional Court made the President not just a formal Chair of the Council, but a very influential member within the HCJ and among judges.²⁷ This was considered

23 Zhilla, Fabian. "Organized crime and judicial corruption: democratic transformation and prospects for justice in the western Balkans: a case study of Albania." PhD diss., King's College London (University of London), 2012. pg. 78

24 There were cases where the inspectorate of the Ministry of Justice had prepared files registering disciplinary violations by a judge, but the Minister of Justice without giving any reason did not sent the case for disciplinary proceeding before the HJC within 1 year from the opening of investigation and as a consequence the investigation elapsed, despite the finding that judges abused the law and their position. For example in the monitoring period April- October 2014, the Minister of Justice refused to bring 5 cases reported by its inspectorate as violations before the HJC, without giving any explanation. See "Pandëshkueshmëria në procesin disiplinor të gjyqtarëve. Analizë e disa prej shkaqeve që stimulojnë pandëshkueshmërinë në veprimtarinë e Këshillit të Lartë të Drejtësisë." Res Publica, May 2015, pg. 20

25 Kondi, Thimio "Probleme aktuale të reformimit të sistemit të drejtësisë- arritje e perspektiva. Roli i Konferencës Gjyqësore Kombëtare. In Ryederl-Lahey, Kosta, Vangjel, Gogu Toni. Administrimi i Gjykatave. 2005. Pg. 21

26 The procedure for appointment begins when the HCJ announces a judicial vacancy in at least two national newspapers and by state radio and television. Law on The HCJ art. 28.1(a). Applications from candidates are reviewed by a five-member commission of the HCJ, chaired by the Deputy Chairman, which verifies that they satisfy the legal requirements for appointment. Id. art. 29.(1)-(3); Regulation on examination of judicial candidates arts. 1, 3. These requirements are summarized in the following two paragraphs.Regulation on examination of judicial candidates art. 5.4. With this information, the HCJ meets to select a candidate for appointment. Law on the HCJ art. 30.1. The President of the Republic then decides whether to appoint the candidate proposed by the HCJ; he is not required to give reasons for his decision. If the President does not appoint the nominee within 30 days, the HCJ will propose a second one and if necessary a third. If the President does not appoint the third nominee, the HCJ announces the vacancy and begins the process again. Regulation on examination of judicial candidates art. 13.

27 The HCJ has no role in the appointment of judges to the High Court and the Constitutional Court. Instead, the President of the Republic appoints judges to those courts with the consent of the Parliament. Article 136.1, 125.1 of the Albanian Constitution 1998; Law on The Organization and functioning of the High Court of The Republic of Albania art. 4, Law No. 8588, 7 Official Journal. 274-80 (2000) Law on the organization and functioning of the Constitutional Court of the Republic of albania art. 7.1, Law No. 8577, 4 Official Journal. 101-22 (2000)]

controversial from the outset.²⁸

During the years 2002-2007, the President exercised the veto right for more than half of the HCJ proposals for the promotion of judges, especially in the establishment of the Serious Crimes Court.²⁹ Fourthly, the weaknesses of the judicial self-governance were not only related to the deficiencies in the composition or appointment method of the HCJ members, but also to the general status of judges in the system. The budget of the judicial sector in Albania before the 2016 Justice reform was among the lowest in the region. This low budget has not only affected the status of judges, their working routine, the lack of proper number of assistant judges, but also the prestige and solemnity of the court, since the majority of trials were held in judges' offices rather than in a proper courtroom. This had created an inefficient system of case management within courts, a huge workload for judges, insufficient time to reason a decision or even close a case. And in a dysfunctional system, it was easy to "make the next victim"; Almost all the judges would have court delays, delays in reasoning or delivery of a written decision, so, it was not difficult to intimidate judges by just opening an in-

spection. Judges of the HCJ were full-time judges as well, so they would not escape the same pattern of threats and weaknesses.

This general weakness of the judicial system had a two-pronged effect. On the one hand, it enabled the executive to easily capture the judiciary through unmerited promotion or perverse accountability through a disciplinary proceeding. On the other hand, it fostered corporatism. In fact, corporatism was not always seen only in the narrow sense, as an instrument of self-serving interest, but also as a shield of resistance towards political influence. There were numerous times where the judges in block would strike down a request of the Minister of Justice for disciplinary measures against a judge. However, when this started to become a norm, it became clear that the members of the HCJ had failed in their duty. The corporatism of judges in the HCJ that led to no accountability or perverse selected accountability damaged the judiciary as much as political capture.

Lastly, the lack of output legitimacy eroded the confidence and the reputation of the High Council of Justice among lawyers and the public. Inevitably,

28 In the Constitutional Debates which preceded the adoption of the 1998 Constitution, it was discussed whether the position of the President as Chair of the Council would be appropriate or not. The Chair of the Court of Cassation back then, opposed this formula by arguing that since judges would be appointed by decree of the President there is no reason to have the President as Head of the Council. He thus plays two roles in the appointment of judges: he chairs the council that proposes candidates for judicial appointment and then decides whether to appoint them. However, the other options presented in the Commission for the Drafting of the Constitution were the Minister of Justice and the Chair of the High Court, but both were rejected, the first as infringing the independence of the judiciary, and the second as having a conflict of interest since the discharge and disciplinary measures taken by the Council were challenges before the High Court. In the Commission it was proposed that the president should have not the right to vote, and this was left to be regulated by law. See: *Debati kushtetues: diskutimet e zhvilluara në mbledhjet e Komisionit Parlamentar për Hartimin e Projektkushtetutës, mars-shtator 1998*, fq. 207

29 Krasniqi, Afrim. *Institucioni i Presidentit të Republikës: Problematika rreth kornizës kushtetuese të formatimit dhe kompetencave të tij*, In "Punime akademike mbi nevojën për ndryshimet kushtetuese." ALTRI 2015 pg.25

the political pressure and the corporatist approach of judges within the judicial council affected the operation and administration of the judiciary as a whole. Notwithstanding the positive efforts and good practices that the HJC (1998-2016) settled by the HJC, it did not effectively accomplish its mission to insulate the judiciary from the politics or hold judges accountable. There were cases of non-appointment of judges or delays in the appointment of magistrates for long periods of time, vacancies announced contrary to the law, delays in the full evaluation of judges, appointment of court presidents in violation of law, announcement of the selection procedure for candidates for judges contrary to the law on the School of Magistrates, lack of objective criteria in the transfer of judges, promotion of inspectors contrary to the law, self promotion of the HCJ members in career courts or higher courts etc.³⁰

One of the biggest shortcomings of the HCJ was the failure to render periodic evaluation for judges. The first evaluation of judges was made in 2012, for the 2005-2006 period. The lack of periodic evaluation for judges gave the HCJ a wide discretion and wide scope for maneuvers which was also abused. The prolonged lack of evaluation was not seen only as

a lack of capacity, but also as lack of good will of the council³¹ Promotions were given even without an evaluation report, contrary to the law. Even the processes of dismissal of judges was not always appropriate. Almost every decision of dismissal were challenged by dismissed judges in court on the grounds of infringement of the fair process.³² As Ardian Nuni Former member of the High Court would state " *in the last years alone, more than 30 judges have been dismissed from their jobs and their disciplinary processes were found unconstitutional from the High Court and Constitutional Court. This fact speaks for itself about the dysfunctional and lack of efficiency of the Council, considering that the development of judicial career should have been its primary mission.*"³³

The solution of the above-mentioned problems surrounding the High Council of Justice was seen again the abolishment of this council and the establishment of a new one.³⁴ Part of the new judicial reform adopted in 2016 in Albania, envisaged a total revision of the judicial council structure in terms of composition, appointment and competences. The drafting of the new judicial council architecture was based upon lessons learned and designing solutions for the

30 Ministria e Drejtësisë, Dokument Analitik, Informacion i detajuar sipas sektorëve të sistemit të drejtësisë, https://www.drejtësia.gov.al/wp-content/uploads/2017/10/Analiza_e_sistemit_te_drejtësisë_FINAL-1.pdf cit.supra, fq. 65-66.

31 Nuni, Ardian, Gjyqtar i Gjykatës së Lartë punimi "Edrejtja, drejtësia dhe ne, ne 20 vjet refleksione" ne Konferenca "Reforma gjyqësore si një ndër 12 prioritetet e sfidës së integritetit të Shqipërisë në BE Tirana Albania. Pg. 16

32 For example, Decision of the Constitutional Court no.16, date 25.04.2003, Decision of the Constitutional Court no.38, date 23.12.2003. Decision of the Constitutional Court no, datë 13.06.2007; Decision of the Constitutional Court no. 26, datë 13.06.2007; Decision of the Constitutional Court no, datë 13.06.2007 Decision of the Constitutional Court no.12, datë 17.06.2004 Vendim nr.17, datë 12.11.2004

33 Nuni, Ardian ibid.

34 Komisioni i Posaçëm Parlamentar për Reformën në Sistemin e Drejtësisë. Grupi i ekspertëve të Nivelit të Lartë. Analizë e sistemit të drejtësisë në Shqipëri. <https://www.parlament.al/Files/Informacione/V%C3%ABllimi%20i%20par%C3%AB,%20pjesa%20e%20dyt%C3%AB.pdf>

problematic structure and governance of the previous Council (1992-2016). As cited by the drafters, the new council architecture also largely based on the best legal practices of other countries as well as international standards enshrined in the European Charter for the status of Judges, Basic Principles of the UN on the independence of the Judiciary, Bangalor principles, Magna Carta of Judges, the European Judges Consultative Council as well as the Venice Commission Opinions.³⁵

The new High Judicial Council (note the difference in the terminology), despite the similarity in name with the previous councils, would have major differences. The new judicial council has a revised composition, removing its *ex officio* members and reducing the number of judges in the council. The High Judicial Council consists of 11 members, six of whom are elected by judges of all levels of the judiciary and five members are elected by the Parliament among renown lawyers in the academia, bar association and civil society. The new High Judicial Council, unlike its predecessor, would be a permanent institution and would serve on a full time basis³⁶. In order to avoid corporatism, not only shall the number of lay members be higher than that of judges (albeit only by one member), but also the Chair of the Council shall be a

lay member elected from the Council.

The new High Judicial Council would have a larger power of competences compared to its predecessor. The High Judicial will decide on the status of judges of all levels, including the High Court justices. In the new legal design the Council has financial, administrative and normative independence, ruling almost in all areas of the judiciary, court service and court administration.³⁷ The HJC is the exclusive authority which directs and manages the administration of the courts, proposes and administers its own budget and the budget of the courts.³⁸ It adopts detailed rules for the functioning of the administration of the Council and standard rules for the internal functioning of the Courts³⁹ determines the territorial jurisdiction and the size of courts etc.⁴⁰ HJC can give opinions to the Minister of Justice on draft acts in the field of justice, even make proposals on legal changes that may affect the work of the judiciary and any other matter that falls within the responsibility of the Council.⁴¹, adopt both normative bylaws, and nonbinding instructions for all the judges, judicial administration, private persons and public bodies⁴². The HJC can also start a constitutional dispute before the Constitutional Court for matters of its interests.⁴³

35 See the Parliamentary Report on the Law on Governance Institution of the Justice System, pg. 7

36 Article 59 The members of the High Judicial Council, unless circumstances for early termination of the mandate have been established, shall hold office for 5 years, with no right to consecutive re-election

37 with the exception of the management of the information technology structure of the courts, which is regulated upon decision of the Council of Ministers;

38 Article 147 2016 Albanian Constitution

39 Article 94 of the Law

40 Article 84 of the Law

41 Article 71 of the Law

42 Article 61 of the Law

43 Article 134 Constitution

The concentration of all this power in the hands of the HJC and the employment of the best formula of representation within the Council, sets the right premises for a proper judicial self governance of the judiciary. However, the previous experiences with the two councils, and the lessons learned from other countries show that too much powers in the council, attracts even more political attention and that the perils of catching the council from outside and inside will always emerge. There will always be tendencies to change the channels of power that impact the judiciary, therefore this second part of the paper would briefly stop at only one element that should be observed carefully and continuously and which affects the governance of the HCJ: the process of appointment of members in the HJC.

2. Composition of the actual High Judicial Council

The High Judicial Council will no longer have *ex officio* members, such as the President of the Republic, the Minister of Justice or the Chair of the Supreme Court. The removal of the *ex officio* members aimed to de-politicize the judicial governance from the executive. Its goal was to respond to different crises created on the ground exactly due to the presence of these *ex officio* members in the Council. Therefore, the composition of the HJC has gone from a tripartite configuration (ex officio members- judges- lay members) to a dichotomic structure, involving a majority of six judges and 5 other lay members elected by the Parliament.

2.1 Election of judges in the High Judicial Council

The Constitution provides that judges who are members of the HJC shall be elected by the General Meeting of Judges.⁴⁴Therefore the National Judicial Conference is abolished and some of its main competences have been transferred to the General Meeting of Judges. The new legal framework provides several filters and requirements that aim to guarantee a HJC composition free from undue

44 Article 3 Law on Governance Institution of the justice system.

influences and favoritism. For the first time the law provides rules for ensuring the representation of all echelons of the judiciary in the judicial council in an “anti-hierarchical tilt”.⁴⁵ Thus the law make sure that even lower court judges, outside of the Tirana district court be represented in the judicial council, securing a pluralist and diversified representation of the judiciary in the Council. The ratio of this provision seems to prevent senior judges or those mainly placed in Tirana to create a nucleus of power that would influence the way in which the judiciary works. Although, the judicial council is not a representative body, this formula goes in line with the principle of representation and democracy, since the first instance court has the largest number of judges. The law provides that at the time of application the candidates should not hold the position of “*chairpersons of any court or members of the governing bodies of groups of interest, such as judges’ associations, judges’ unions*”.⁴⁶ Since Albania is a small country and there are random cases where relatives work in the judicial system, the law provides that judges who are candidates for the HCJ may not have any member (first degree relative) who are incumbent Council members or candidates for members⁴⁷. The members of HJC are given a special status. Moreover to

avoid having a self-serving council, it is provided that, a judge member of the Council cannot be transferred, promoted or delegated during the three years following the end of the mandate. They shall also not be subject of evaluation promotion, to avoid any favoritism from their peers.⁴⁸ The members of HJC is given a special status. They shall have the status of magistrates they are entitled to the salary and benefits of the High Court judge⁴⁹. And for the first time all the judges sitting in the judicial council shall be obliged to successfully pass the vetting process.

Unlike the selection procedure for lay members, the law leaves it to the judicial power itself to regulate the elections of its representatives in the Council. In fact the law delegates to the General Meeting of Judges with the initiative of the President of the High Court⁵⁰ the right to adopt more detailed rules on the voting process and the voting commission. On the one hand, such avoidance to regulate the details of the election of judges by law, must be seen as a respect for the independence of the judiciary, on the other hand the judiciary should avoid repeating past mistakes and abusing the lack of regulation to advance self-serving and non legitimate interests. The first Regulation on the General Meeting of Judges for

45 More specifically: 3 judges should be elected from the first instance court, where at least one of them is a judge of first instance court outside of Tirana, (ii) two judges are from the appellate court, where at least one of them is a judge of appeal court outside of Tirana, and (iii) one is a judge at the High Court Article 7 Law on Governance Institution

46 Article 7(2)(b) Law on Governance Institution

47 Article 7(2)(ë) Law on Governance Institution

48 Neni 4 of the Law on Governance Institution

49 Article 4 and 59 of the I Law on Governance Institution aw

50 However, in the new legal framework the High Court and its President are charged with specific tasks in the process of election of judges in the HJC. More specifically, it is the President of the HC who opens the call for the expression of interests to become members of the HJC and who summons the General Meeting of Judges to vote for the respective candidates. It is the HC responsible to verify the completion of the criteria by the candidates for the HJC and to administer the process of election, a special Commission of Election is established which is composed by 3 assistant judges from the High Court.

the Selection of Members of the High Judicial Council was adopted in 2018.⁵¹ It regulates the process of establishing voting commissions, the presentation of candidates, the organization of the ballot day and all the necessary elements of election process. However, it does not have any specific provision or reference with regards to the pre-election stage, the election campaign, endorsement, lobbying or campaign financing. Thus, the Regulation provides that each of the candidates shall present their platform for a maximum of 5 minutes before the colleges during the ballot day. However, it is not clear whether judges hold meetings before the election day, with whom they meet, whether they travel to another country, what they share or promise during their meetings. Even the Code of Ethics of Judges does not have any provision that sanctions unethical behavior or promises during the judicial election campaign. It is needless to say that it is not 5 minutes of presentation in the election day that helps judges to make up their mind which of their peers deserves to be a member of the HCJ. Therefore, some general provision in the Councils bylaws, or a manual with principles may be an option to guide both candidates and judges in leading an ethical process of selection of their representatives in the Council.

New channels of authority and power dynamics can exert influence within and without the election of judges in the HJC by their peers. Experiences in other countries show that even when judges elect their representatives it does not mean that political ties do not matter.⁵² In Italy, France and Spain the judicial associations, often linked with a certain political party, were influential in the elections of the judicial council members.⁵³ The informal groups who gather around court presidents such as Czechia or around the President of the Supreme court such as Slovakia retained powers over who will sit in the judicial council, and have a major say in key areas of the judicial governance.⁵⁴

We asked the interviewees whether the current HCJ elections, saw any court presidents, judicial associations or other important senior judges influencing the election of judge members in the HCJ. Rightly most of the interviewee mentioned that the vetting process has created a new situation on the ground, where the majority of court presidents and senior judges were removed by the vetting processes⁵⁵. Another interviewee pointed out that with the new regulation, unlike before, the competences of the court presidents rests with the Court Council. However,

51 http://www.gjykataelarte.gov.al/web/draft_rregullore_finale_1878.pdf

52 Kosař, David. "Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe." *German Law Journal* 19, no. 7 (2018): 1567-1612. pg. 1589

53 Benvenuti, Simone, and Davide Paris. "Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model." *German Law Journal* 19, no. 7 (2018): 1641-1670.; Vauchez, Antoine. "The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France." *German Law Journal* 19, no. 7 (2018): 1613-1640. Pérez, Aida Torres. "Judicial self-government and judicial independence: The political capture of the general council of the judiciary in Spain." *German Law Journal* 19, no. 7 (2018): 1769-1800.

54 Blisa, Adam, Tereza Papoušková, and Marína Urbániková. "Judicial Self-Government in Czechia: Europe's Black Sheep?." *German Law Journal* 19, no. 7 (2018): 1951-1976. Spáč, Samuel, Katarína Šípulová, and Marína Urbániková. "Capturing the judiciary from inside: The story of judicial self-governance in Slovakia." *German Law Journal* 19, no. 7 (2018): 1741-1768.

55 Interview, Judge at the District Court of Elbasan.

*this does not exclude the possibility that the courts council abuse their position in the future, because even the first council looked very good on paper but the failure to lead came by the abuse of power.*⁵⁶ With regards to judicial associations, the perception is that their role has been diminished after the justice reform. If before, or even during the justice reform the judicial association were very actively challenging laws in the court, including here the justice reform package, they became more silent after the start of the implementation of the reform. Namely, they acted once by challenging in court the decision of the government to remove their diplomatic passport and at least twice in defense of judges being threatened or slandered in the public. This hesitation to be a vital voice for judges, may be a result of the broad framing of statutory provision stipulating “that the performance activities of the judicial association should not run against the competences of justice institutions” which, when read together with the articles granting large competences to the HJC seem to leave less space to the judicial association activities. On the other hand, the vetting situation has somehow paralyzed the normal activity of courts and judges and in this aspect even their organizational activities. However, this is a temporary situation and the HJC should think ahead of the positive and constructive dialog with the judicial associations. Even after this deep and substantial reform, there is a risk of creation of new channels of powers that might affect the election of the HJC members, who then influence important decisions for the judiciary. Candidate judges should be careful during the

election stage not to act as if their only way to realize their aspiration is the cultivation of personal ties with centers of powers. Moreover, judges should seriously understand the importance to elect their best peers in the HJC, judges who can be actors of change, able to change the judicial culture and the old mentality of serving powers instead of serving people. If these processes are neglected or compromised, judges can rest assured that another reform will come again and again and they might be the next one losing the tenure.

Lastly, when judges were asked about criteria that compels them to vote for a certain candidate, they mention professionalism, good reputation, integrity, good record of education, but none of the interview mentioned managerial or leadership skills. Once appointed in this commission, the judges that are chosen in the judicial council are assumed would know how to draft strategic documents, draft and monitor budget implementation, draft bylaws and be good managers and stewards. The new model of judicial self governance tends to be an hybrid between the typical judicial councils that deal with the status of judges and the northern European model of court service. By the increase of ‘housekeeping’ functions (managing budget, material resources, operations), it is necessary to have good managers within the council. Managerial competences are important for the efficiency of courts and, in that respect, shape the quality of the legal system⁵⁷. However, there is nothing in the education system that prepares *Judges-Managers* with managerial, administrative and

56 Interview, Judge at the District Court of Vlora.

57 Garoupa Nuno, Ginsburg Tom (2009a) Guarding the guardians: judicial councils and judicial independence, cit. Supra, pg. 22

planning skills, let alone being this profile a condition for election of judges in the HJC. If we really want to have a judicial council that is well governed inside out, we should think about the internal organization, efficiency and good management of the Council. We would recommend specialized courses or training for judges which equip them with leadership, administrative and managerial skills and do not take for granted that judges would be perfect managers just because they were elected by their peers to self govern the judiciary.

2.2. Election of lay members in the High Judicial Council

With regards to the lay member of the HJC, the law provides that they shall be selected among prominent lawyers with fewer than 15 years of professional experience. Two lay members shall be elected from the advocates, two from the corps of law professors and the School of Magistrates and one member shall be from the civil society.⁵⁸ For the first time the Parliament shall not directly appoint lay members in the Council, but rather vote the candidates from a shortlist presented by nomination body, respectively the Bar Chamber, the General Meeting of Professors and an *ad hoc* Committee from the civil society, serving as filtering mechanisms for the candidates. The nomination bodies have to draft a list of the most voted candidates that

would be afterwards voted in the Parliament. The ratio of this proposal was to avoid situations where the Parliament chooses nominees directly and somehow influence or compromise the candidates. The law has engaged multiple different actors in the process of opening the call, verifying the eligibility of the candidates, ranking and voting of the candidate members for HCJ. The existence of multiple veto players in the selection process increases the chances for more independence since, it is hard to concentrate the process in the hand of only one actor. However, although in paper this was a great solution, it created difficulties when being implemented and caused delays in the establishment of the HJC⁵⁹.

Despite the different tiers and actors involved in the process of selection of members, and all the formula used to give legitimacy to a fair and meritocratic election of lay member, yet the process of their election was highly politicized. The political parties could not reach the qualified 2/3 majority in any of the three rounds and at the end the lay members were chosen by lot. The lack of consensus to choose the lay members was seen again in February 2022, in the renewal of the HCJ composition with two lay members. Although the lot is seen as a deadlock mechanism, to avoid situations of blocking the Council formation, the appointment of the members of HCJ without the Parliamentary consensus affects the legitimacy of the Council.

58 Neni 147(4) of the Albanian Constitution.

59 For example, the law provides that the candidate members of the HJC from the rank of advocates, will be evaluated and ranked by ad hoc committee. This ad hoc committee is composed by the Ombudsman, two advocates, a member from the Academy of Science and is led by the head of the Justice Appointment Council. When this ad hoc committee was established, its chair withdraw as the head of the Justice Appointment Council. As a consequence, the ad hoc commission for selecting the advocates could not gather, creating delays

Moreover, the election of lay members in the HJC has been not only a battle between political forces, but also a complex and lengthy procedure, sometimes even challenged in court. For example, one of the candidates elected by the professors, citing medical reasons, failed to appear for an interview before the nomination body (the Special Meeting) and was subsequently disqualified from the voting process.⁶⁰ He challenged the decision of the Special Meeting before the Administrative Court. The Administrative Court acknowledged his right to be heard by the Special Meeting of the HIE, considered the first meeting null and ordered the repetition of elections before the Special Meeting.⁶¹ Moreover, the Secretary General of the Parliament decided to exclude 3 members from the list of candidates, mainly because they could not prove the declared work experience abroad, excluding by this ground also a member who took the majority of votes.

Some preliminary remarks can be given with regards to the procedure of selection of HJC lay members. Firstly, all the interviewees acknowledged as a main strength of the new judicial council the strong filters for the selection of HJC lay members from the Parliament. However, the chosen model did not go without its critics. One of the interviewee said that the selection criteria *were too high and aiming at the*

excellence, but not taking into consideration the potential local pool of candidates".⁶² Actually, one of the HCJ member from the ranks of attorneys⁶³, is now under investigation on the charge that he had falsified the years of experience as an attorney at law, in order to meet the set of criteria to be appointed HCJ member. This somehow confirmed the Venice Commission opinion that the pool of lawyers and experts that fulfill the legal requirements for filling the new justice institution was very limited and insufficient in the country. In fact, there were times when the call for member of the High Judicial Council was opened and reopened 6 times, without having a successful candidate. An evaluation and assessment would be needed to confirm whether there are enough candidates to meet the criteria or perhaps the criteria need to be loosened.

Apart of the low number of qualified lawyers applying, there has been continuous hesitation to apply for members of HJC.⁶⁴⁶⁵ According to one interviewee the hesitation to apply, more than the non fulfillment of the criteria is linked also with the political debates on the justice reform, which sometimes also denigrate the personal dignity and data privacy of the candidates. Potential candidates might hold back from the opportunity to run for the HJC position because they are afraid their public reputation and

60 <https://ata.gov.al/2021/10/12/zgjedhja-e-anetareve-te-klp-drejtuesit-e-universiteteve-degjese-me-kandidatet/> <https://www.reporter.al/universitetet-perzgjedhin-7-kandidatura-per-4-vende-ne-klgj-dhe-klp/>

61 <https://www.reporter.al/trupa-e-pedagoqeve-perserit-proceduren-per-kandidatet-e-klgj-dhe-klp/>

62 Interview, Professor of law, University of Tirana.

63 <https://www.reporter.al/2021/05/26/gjykata-e-posacme-urdheron-spak-te-hape-hetim-ndaj-anetarit-te-klgj-alban-toro/>

64 For example, when the call was opened for candidates for HJC coming from the appellate courts, initially there were no candidate form judges who work outside Tirana. After the re-opening of the call, there were only two candidate judges outside Tirana for one position. See: Erida Skendaj, Emidio Tedeschini, Fjoralba Caka, fq.110-111.

65 the call for judicial council candidates coming from the academia was opened three times by the Secretary General of the Parliament, due to the low number of candidates. Erida Skendaj, Emidio Tedeschini, Fjoralba Caka, fq. 64

good professional standing will be destroyed by the political parties in the public arena or social media. We need to explore mechanisms to encourage the best candidates in the system to apply, and whenever these members find the courage to stand for the application, the media should be careful the manner in which they display political leaders, and duly inform the public for what stands and what is a fake news. The specialized civil society organizations should also play a vital role in this regard.

Lastly, Albania has been and still is a migration country, therefore there will always be candidates that study and work abroad. Rightly, in principle the non taxed income jobs will not count as professional experience, but the respective bodies should take all the measures to accept other proofs from the candidates that explain their professional experience and arguments. Otherwise, we risk losing candidates from the small pool of qualified lawyers that are interested to become members of the HJC.

3. Towards the quest of legitimacy

Each form of judicial self-governance is expected to strike a particular balance between “an unacceptable judicial subordination to political forces and an equally unacceptable corporatist ruling”.⁶⁶ Defending the judiciary from political influence and ensuring (external) judicial independence is just as important as fighting corporatist effort that feed judicial unaccountability. In fact independence and judicial accountability seem to be the most common words attached to the mission of the judicial councils. Even the Albanian Constitution acknowledges that the mission of the HJC is to “ensure the independence, accountability and the smooth running of the judicial power in the Republic of Albania.” (art. 147).

When we asked our interviewee if they have noticed political influences on the actual HJC activity, there were hesitations to make strong statements. Some of the interviewees were neutral and responded that it was early to judge and they could not point out to any instance of evident capture of the HJC from the political parties thus far. On the other hand, there

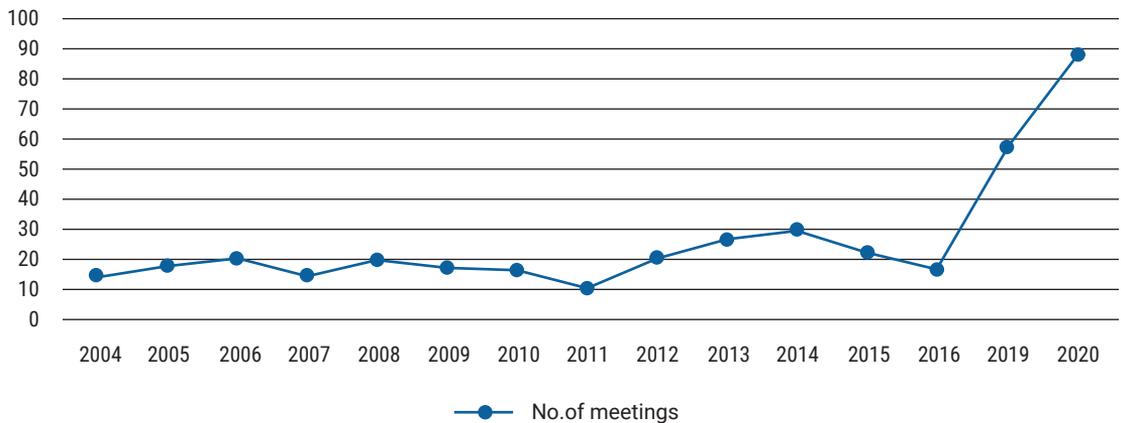
66 Vauchez, Antoine. “The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France.” *German Law Journal* 19, no. 7 (2018): 1613-1640, pg. 1615, Citing Paul-Coste Floret, special rapporteur of the constitutional project on Conseil Superior de la Magistrature in the Constitutional Assembly 1946. Also Garoupa Nuno, Ginsburg Tom (2009a) Guarding the guardians: judicial councils and judicial independence. *Am J Comp Law* 57(1):103–134, pg. 106: Councils of the Judiciary are ‘designed to insulate the functions of appointment, promotion and discipline of judges from the partisan politics process while ensuring some level of accountability’

were judges that were more positive and appreciated the integrity of HJC members and especially its public reaction in the media to defend judges from unjust political or private attacks. These judges encouraged a bold and active role of the HJC to defend the status of judges in the public opinion. However, at least two of our interviewees considered the Dvorani case, as an example of HJC members are not being immune from the political pressure and that the HJC failing to process political pressure accordingly.

Another interviewee praised the fact that HJC refused to take important decisions without first adopting the normative basis and the respective regulations. Although, this may have caused delays in certain processes, the tendency to choose standard setting before deadlines is still evident. For illustration, the HJC refused to speed up or trespass their own internal processes for the promotion of the judges in the High Court, although the High Court remained with only one judge, disregarding the domestic pressure from the Parliament or executive, or even the pressure of opening the negotiations with the EU. As a consequence the HJC was highly criticized for not finding legal remedies to speed up the process, nevertheless the HJC resisted the pressure and first proceed with the adoption of regulations and bylaws and then opened the process of selec-

tion and promotion of judges in the High Court. With regards to judicial accountability only recently we have the first cases before the HJC. Even here the expectations were stronger than any opinion or assessment on the current activity of the HJC. Most of judges interviewed were concerned whether during the disciplinary proceedings the HJC would respect the settled procedure in the statutory law and other bylaws. As one judge said that the HJC should not ignore the settled principles that the Constitutional Court has settled for the disciplinary proceedings of judges and raise the standard above the previous councils. However, one of the interviews pointed out that the weight of fighting corporatism and pushing forward accountability rests more on the shoulders of the lay members and they are expected to play a more active role. It remains to be seen if there will be a change of mentality on this regard, to understand that even judges within the council should foster accountability as much as the lay members.

There is a huge improvement in the so called explanatory accountability of the Council through an increased transparency towards public institutions and the public in general and concrete steps to improve the communication with the public. Each of the plenary meetings of the Council is recorded and uploaded on the web page of the Council. One of the



HJC members is appointed as contact person with the media and public relation to promptly inform the media on sensitive cases or upon requests. Media judges are appointed by the HJC in each court with appellate jurisdiction. The HJC has adopted a Strategic plan for Communication with the justice system.⁶⁷ as well as a Regulation of Communication of the HJC for the Media.⁶⁸ Other important steps towards more transparency are the publication of the reports of different HCJ standing committees, the publication of a yearly report on the activities of the Council, including information on budget and human resources, not to mention publishing every decision, bylaws and activity of the Council in the web page. Interestingly is that the HJC is also very active on its social media account (Facebook), daily posting the main decision made by the Council in a concise and summarized note.

If we judge by the number of meetings and number of decision, the new Council surpasses the activity

of the previous council by 3 or more times in terms of efficiency of performance.

In the first year of its establishment the HJC has organized 57 meeting and adopted 315 decisions, while in 2020 the HJC held 87 meeting and adopted 654 decisions. It is not only the volume of the HJC decisions that show its commitment to govern the judiciary, but also the nature of the decisions and the general tendency to base its decision making on clear, settled, transparent criteria and processes.

However, despite the tremendous work done by the HJC, one of its members pointed out, that the Council has yet to change the public perception on the judiciary or the Council itself. So the main quest is what is needed for HJC to retain legitimacy?

The practice of three judicial councils in Albania has shown that establishing a model of judicial self-governance based on the best European standards

67 Decision of the High Judicial Council nr. 590, date 26.11.2020. <http://klgj.al/wp-content/uploads/2020/12/PLANI-STRATEGJIK-I-KOMUNIKIMIT-P-C3%8BR-SISTEMIN-GJYQ-C3%8BSOR.pdf>

68 Decision of the High Judicial Council 592, date 26.11.2020 <http://klgj.al/wp-content/uploads/2020/12/RREGULLORE-P-C3%8BR-KOMUNIKIMIN-E-K-C3%8BSHILLIT-T-C3%8B-LART-C3%8B-GJYQ-C3%8BSOR-ME-MEDIAN.pdf>

developed by international and European organizations⁶⁹ does not constitute an automatic guarantee of the legitimacy of this authority. The CCJE opinion 24(2021)⁷⁰ for the first time reiterates that, much like the legitimacy of individual judges, there are two sources of legitimacy for Councils for the judiciary: formal or constitutional legitimacy and functional legitimacy⁷¹. Based on this document, two minor observations with regards to the legitimacy of the actual Judicial Council.

Input legitimacy, the appointment of the members of the HCJ in accordance with the constitution and other applicable rules is a source of legitimacy both for individual council members and the council in its entirety⁷². However, the input legitimacy should be more than formal legitimacy. The process of appointing of HJC members may be formally in compliance with the law, but ill effected by cultural and local informal practices/ as well as the political context that delegitimize the input. For example, the highly politicization of the process of selection of the members of the HJC elected by Parliament, kills their appearance of legitimacy. The lack of applications from highly qualified lawyers/judges in the Council affect the credibility and trust in the

institution. Shadow election campaigns of judges, underground meetings and unethical behaviour during the elections/appointment phase will affect the quality of members and their own independence. The judiciary itself, but also all the parties that are involved and monitoring the process should be really careful to observe its integrity, fairness meritocracy of the process and the quality of members (input) of the Council. Judicial independence and self-governance should be considered as a public good, and other powers of government, politicians, the media and civil society must work together in a long-term effort to increase professionalism, transparency and ethics within the judiciary to turn rules on paper into a culture of respect for judicial independence and the rule of law (CCJE 18(2021)para 3).

Secondly, it is true that the output/functional legitimacy” of the judicial Council is earned through work of the highest possible quality which respects high ethical standards.⁷³ Every Council for the Judiciary and the judiciary it represents must earn the trust of the public and its support by guaranteeing the independence and accountability of the judiciary.⁷⁴ However, little attention has been so far on through-put legitimacy of these institution and the good

69 Bobek, Michal, and David Kosář. "Global Solutions, local damages: a critical study in judicial councils in Central and Eastern Europe." *German Law Journal* 15, no. 7 (2014): 1257-1292. pg1269. The process of setting the standards of a Euro-model judicial councils is deemed to be neither democratic nor participatory, since these standards are developed by a narrow group of judges and high-ranking officials of international and supranational bodies. The judicial council model somehow removes from the elected branches the right to rule on the judiciary and transfers virtually all these powers to the council.

70 CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems. 5 November 2021. Accessed <https://rm.coe.int/opinion-no-24-2021-of-the-ccje/1680a47604>

71 CCJE Opinion No. 24 (2021): to describe this two aspects of legitimacy refers to CCJE opinion 18(2015) which develops broader the notion of legitimacy of judges. Pg.5

72 Ibid.

73 CCJE Opinion n°18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, <https://rm.coe.int/16807481a1>

74 CCJE Opinion No. 24 (2021)

governance of its internal processes. Throughput legitimacy can be judged by the accountability, transparency, inclusiveness and openness⁷⁵, and also legality and fairness, integrity, impartiality and credibility of the processes of the organization/institution⁷⁶. In the case of Albania, the monitoring of the throughput legitimacy is of particular importance. The legal framework has paid lots of attention to the *ex-ante* control of the judicial council members, in terms of professional requirements or methods of appointments. However, there are less rules with regards to the *ex-post* influences, political pressure, conflict of interests and corruption after the judicial council members are appointed. When the focus is only on the outcome and deliverables of the institution, undemocratic, unethical, corrupted interventions may influence the processes of decision-making and ruling processes within the institution and this this will, of course, come to indisputably affect the outcome⁷⁷. We need to build resilient institutions rather than create new institutions to solve the same problems. There is a need to focus not only in the

input and output legitimacy of the judicial council, but also on its quality of governance, its human and budgetary capacities, its problem-solving capabilities, abilities to self-reflect and innovate, implement change and embed knowledge. Only a judicial council that is able to reflect on its processes of decision makings, the threats towards the independence of the judiciary and its lack of accountability, that embed knowledge from its own processes or the mistakes of the previous councils, that is able to bring an impact on the community of judges, will be resilient. Otherwise, whenever there is a failure in the judicial system the judicial councils will be again the locus of reform. That is why throughput legitimacy should be observed.

Another point to stress is that the success of judicial councils will also depend on the response of individual judges towards its regulatory policies and governance. It is true that the judicial councils should avoid both political and corporatist dominance, but on the other hand it should also encourage the

75 Schmidt, Vivien, and Matthew Wood. "Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance." *Public Administration* 97, no. 4 (2019): 727-740

76 *ibid*, pg.730

77 Caka Fjoralba and Ardian Hackaj. Good Governance of New Justice Institutions In Albania. Policy Paper Cooperation and Development Institute (CDI), Tirana. November 2021 <https://cdiinstitute.eu/wp-content/uploads/2021/11/Good-governance-of-New-Justice-Institutions-in-Albania.pdf>

development of ethics and the individual independence of judges, through norms and training programs that incentivize judges to internalize their own independence and professional ethos. In this regards, a stronger cooperation with the School of Magistrates is required.

Lastly, if the legitimacy and reputation of the judicial council in the community of judges is increased by the fair processes of appointments, promotion and disciplinary proceedings, its reputation with the general public asks for a more vivid and aggressive communication. Especially in country like Albania, where judicial corruption has been resisting for too long, there is a need for the judicial council to reach the lay citizens not only with the dissemination of information, but also through easily accessible and comprehensible information.

If the judicial council is not able to improve its legitimacy and reputation, then there will always be the risk that it will be replaced by yet another Council, and the history of judicial councils in Albania has shown that this not the optimal solution.

Conclusions and recommendations

Judicial self-government can be reduced or abused by politics to the detriment of individual judges. The solution is not to modify the judicial council back and forth, because the history shows there is not a perfect formula. Rather than pumping taxpayers or donors money to new reforms and institutions to pass through this democratic transition, we need to work more on the mental transition towards an independent, impartial and efficient judiciary, where the actors and institutions are more resilient towards inside or outside capture.

The history of establishing and transforming the judicial councils shows that first of all foundations of the judicial self governance are political. The configurations of the judicial council and the judicial reform have come about on the cusp of the political changes, or in the aftermath of high-profile scandals.⁷⁸ However, changing the councils configuration and competences and updating it based on the best European standards developed by the international/European rule of law industry, is a futile solution.

Based on the above, some conclusions and recommendations would be:

78 Kosar, David. "Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe." *German Law Journal* 19, no. 7 (2018): 1567-1612. pg 1599

- Euro model success depends on the respect of fundamental principles of rule of law, formal and informal practices and culture of independence.
- Formal and informal practices of appointment of members are both important aspects of input legitimacy.
- High politicization of the process of election/appointment of members of the HCJ affects their credibility and legitimacy. Political parties and the media should be careful in the way they address to the candidates running for the HCJ office and the process of their appointment.
- The pre-election campaign of judges who run for the council should be ethical and transparent. It would be advisable to develop written rules/manuals which regulate aspects of the election campaign, its financing, meetings in order to prevent undue influences and endorsements.
- There is a need to encourage the best members of the community of lawyers/judges to run for the HCJ and support should be given. The media and the civil society should create a positive environment, that detect fake news besmirching the reputation of candidates evolve constructive debates and monitor reports on the candidates as well as the activity of the Judicial Council.
- The criteria for selection of lay members should aim for excellence, but also into consideration the existing pool of experts and lawyers. Otherwise it could limit the competition and the input of candidates for the council.
- Throughput legitimacy, the quality of governance within the Council should gain more importance in the internal evaluations of the Council or its assessment in EU progress reports. Through put legitimacy affects the outcome and the impact of the Judicial Councils.
- We need to create a culture of reflection and learning within the judicial council, that is able to improve itself and its internal process of decision-making. We need institutions which embed knowledge and innovate, rather than abolish one judicial council and create a new one to solve the same problems.
- To improve the quality of good governance within the judicial council, the management and leadership of the Council, there is a need for training of managerial and soft skills for judges and other members of the Council and its administrative staff.
- The reputation and legitimacy of the Judicial Council will depend on the behavior of individual judges. Therefore, there is a need to focus on

the incentives and training programs to strengthen the individual independence and professional ethics of judges.

- There is a need to strengthen the communication capacities of the Judicial Council with the internal audience of judges/lawyers as well the external audience (general public) to break the assumptions of judicial corruption and create a new positive narrative around judicial legitimacy.

Information about the project

The underlying objective of this project is to *complement the European Commission's process of vertical judicial Europeanization with an internal, horizontal, initiative that would combine an academic and practical approach in detecting and noting the main shortcomings of our judicial culture,* and through consultations with international and regional experts, outline recommendations for future steps in the Europeanization of judicial culture.

The project is coordinated by the **Institute for Democracy "Societas Civilis" Skopje (IDSCS)** from North Macedonia, in cooperation with **T.M.C. Asser Instituut** from the Netherlands, the **Judicial Research Center (CEPRIS)** from Serbia, and the **Albanian Legal and Territorial Research Initiative (ALTRI)**, and supported by the **Dutch Fund for Regional Partnership (NFRP)/Matra**. The project will be carried out and have impact in **Skopje (North Macedonia), Belgrade (Serbia)** and **Tirana (Albania)**.

Information about IDSCS

IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia's European integration. IDSCS has the mission to support citizens' involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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