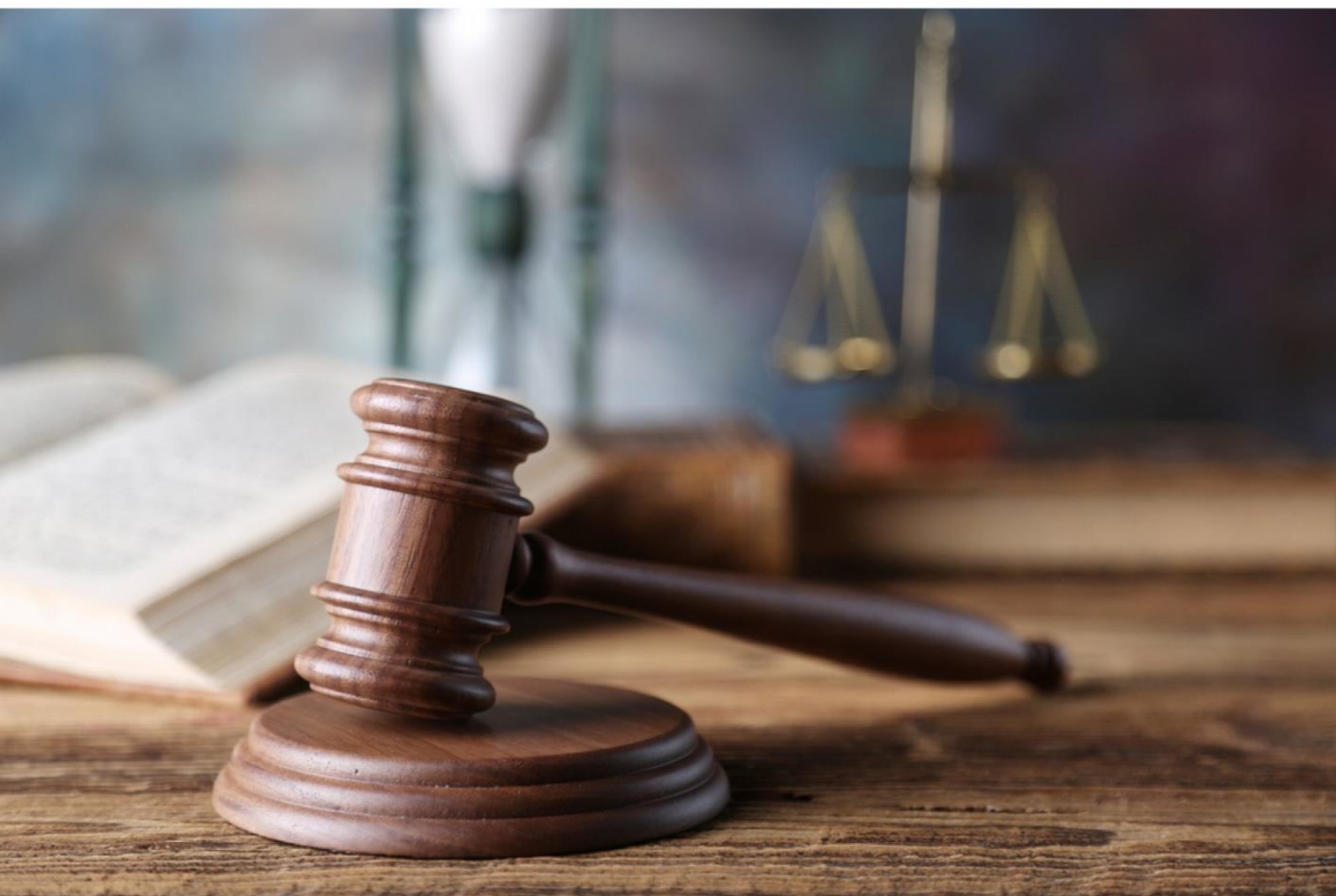


**EU ENLARGEMENT IN SEE6 AND
COUNTRY REFORMS**
-
**THE JUSTICE REFORM IN ALBANIA AS
A CASE STUDY**



POLICY STUDY
AUGUST 2020

EU ENLARGEMENT IN SEE6 AND COUNTRY REFORMS

-

THE JUSTICE REFORM IN ALBANIA AS A CASE STUDY

*“Wenn man einen Sumpf trockenlegen will,
darf man nicht die Fröche fragen”**

European proverb

POLICY STUDY

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* When it becomes necessary to drain the swamp, you don't stand around asking the frogs

EU ENLARGEMENT IN SEE6 AND COUNTRY REFORMS – THE JUSTICE REFORM IN ALBANIA AS A CASE STUDY

The policy study was prepared by Mr. Ardian Hackaj, Director of Research at CDI. Special thanks go to Dr. Adea Pirdeni for her deep knowledge and insights into the intricacies of the Justice reform in Albania, and for the thoughtful and detailed recommendations.

During its preparation more than 15 interviews with actors, subjects and beneficiaries of the Justice Reform have been conducted such as with senior officials from the newly established justice structures, the executive, the legislative, and other actors of the justice reform. The complete list of interviewed institutions is attached in Annex 1.

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Tirana, August 2020

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LIST OF ABBREVIATIONS

CC	Constitutional Court
CoM	Council of Ministers
EC	European Commission
ECtHR	European Court of Human Rights
HIJ	High Inspector of Justice
HJC	High Council of Justice
HJC	High Judicial Council
HPC	High Prosecutorial Council
IMO	International Monitoring Operation
IPA	Instrument of Pre-Accession
IQC	Independent Qualifications Commission
MEFA	Ministry for Europe and Foreign Affairs
MoJ	Ministry of Justice
NBI	National Bureau of Investigation
PC	Public Commissioners
PoR	President of the Republic
SAA	Stabilisation and Association Agreement
SAC	Special Appeals Chamber
SC	Supreme Court
SCCOC	Special Courts for Corruption and Organised Crime
SPAK	Special Prosecution for Corruption and Organised Crime and Special Investigation Unit
SPCOC	Special Prosecution for Corruption and Organised Crime
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
WB	Western Balkans

Abstract

While the reforms in Albania were advancing, gradually they were becoming integral part of the conditionality checklists put by EU for the official opening of negotiations. The existing conditions were becoming more detailed, new ones focused on measurable impact were being added, and their scope was enlarged to include “fundamentals” such as democratisation, human rights or rule of law. Those new additions were almost exclusively the result of requests coming from the Member States (MS).

Latest developments point towards a larger role of the EU Member States as compared with the EU Commission in the Enlargement process, and for an increase in importance of the fundamentals (or the legitimacy components of democratic institutions). The 2020 Enlargement strategy confirms this shift with the role that it foresees for MS in monitoring on the ground, in reporting and in intervening through assistance in selected sectors. Those developments have been at the centre of the EU Council discussion of October 2019 on the opening of negotiations with Albania (and North Macedonia).

In the case of Albania, the Enlargement instruments of political dialogue, conditionality and assistance have been lately focused on the Justice reform. This increased attention on the Judicial was needed to pave the way for speedier convergence in the other sectors. However, it was the slow path of the Justice reform that latter affected the progress of Enlargement itself, resulting in a Catch22 situation. Enlargement incentives were needed to complete the Justice Reform while slow advancement of Justice reform was holding back the opening of negotiations.

The main problems encountered by the Justice Reform in Albania fall in two main categories. First, the political will of local elites was not taken sufficiently taken into account. Most of the blockages in the set up of new justice institutions and structures were derived from political bickering. When it became apparent that no alternative scenarios were foreseen to overcome those obstructions, many *ad-hoc* solutions and compromises were adopted.

Second, the good governance factor impacted directly the smooth advancement of the reform. After the vetting and the set up phase, the new structures and institutions faced many challenges especially while trying to cope with the timetable of deliverables. The cascade methodology of the reform and the sequential triggering system (need to close one step in order to advance to the next) delayed the process. This impacted the efficiency and sustainability of newly set institutions as expressed by sub-optimal availability of financial and human resources, un-complete and / or delayed adoption of rules of procedures for the new structures, and over-reliance on the external assistance. It became apparent that the design phase of Justice reform had produced a substantial overestimation of local human resources available to fill the vacancies in the newly reformed judiciary. With regard to budget support, many institutions suffered of lack of initial budget support, and some of them are still in substantial need of additional funding.

But notwithstanding its inherent challenges, justice reform in Albania has empowered new and progressive actors to challenge and change the system. Progressively the newly established anticorruption institutions are being used as a lever to dismantle the corrupt and incompetent justice system. They are providing the Archimedean Point allowing the progressive forces to stand upon and methodically dislodge a captured system that previously was thought

unshakeable. It is telling that the first ever denunciation for corruption at SPCOC was lodged by a grassroots CSO.

All the above has a direct impact on the Enlargement dynamics of Albania. Compared with Western Balkan frontrunners, in Albania the constitutional process of reorganizing the judiciary was completed before the official opening of the Enlargement Negotiations. Country challenges have shifted towards the functioning and efficiency of the newly established structures. The frontloading of conditionality has allowed Albania to mark a significant progress in many areas covered by Chapter 23, even if the accession negotiations with the EU have not been officially opened yet. Having become a Reform Frontrunner, Albania should aim now to be an Enlargement frontrunner.

With the revised Enlargement Methodology the focus of EU control has gradually shifted from the performance of new institutions to the monitoring of their political legitimacy. Member States and the Commission are actively monitoring the eventual capture of new democratic institutions, their representativeness, and their accountability. Moreover, the revised Enlargement Methodology with its focus on fundamentals aims to avoid that reforms and Enlargement block each other, to streamline and harmonise the efforts both from inside and outside the WB6 countries to succeed, and to make irreversible the democratic progress.

Enlargement is the main reform engine in SEE6.

Chapter 1

I. ENLARGEMENT AND LEGITIMACY OF REFORMS

In April 2018 the European Commission issued a positive recommendation for Albania to open accession negotiations. However, the EU Council decided to not follow such recommendation in its entirety and appended to the Commission proposal seven additional points that should be fulfilled by Albania for the First Intergovernmental Conference to take place. They included, inter alia, reforms in public administration, in the judiciary, and in the fight against corruption and organized crime¹.

Nevertheless, neither in June, nor in October 2019 the Council for General Affairs did succeed to reach a positive decision for the opening of accession negotiations with Albania. Ultimately, only in April 24, 2020 it decided to give the green light for the negotiations process to start². This time the Council appended 16 conditions to European Commission list (see table 1, below).

I.1. Conditionality and Reforms

That is how the successful implementation of reforms became an integral part of the conditions put by EU for the official opening of accession negotiations. While the list of on-going ones was becoming more detailed, new conditions that focused on measurable impact were being added. What is more, their scope was being enlarged to also include issues that have to deal with democratisation, human rights or the rule of law.

“...successful implementation of reforms became an integral part of the conditions put by EU for the official opening of accession negotiations”

"In the case of Albania reform, currently, the EU action is focused on monitoring of governance standards and on exerting pressure on the political elites to implement them"

The new additions were mainly the result of requests coming from the Member States. The table below gives a clear indication of this evolution, all by providing a good example of the panoply of instruments that the EU uses to influence institutional reforms in the partner countries. In the case of Albania reform, currently, the EU action is focused on monitoring of governance standards and exerting pressure on the political elites to implement them, as

¹ EU Council, Albania, Current Situation, <https://www.consilium.europa.eu/en/policies/enlargement/albania/>

² EU Council, Council conclusions on enlargement and stabilisation and association process- Albania and the Republic of Northern Macedonia, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/25/council-conclusions-on-enlargement-and-stabilisation-and-association-process/>

illustrated by the conditions I, II, III, IV and IV below.

Table 1. Frontloading conditionality: EU Council track record table for Albania

No.	JUNE 2018 EU COUNCIL DECISION ON ENLARGEMENT AND SAP	JUNE 2019 AND OCTOBER 2019 EU COUNCIL DECISIONS ON ENLARGEMENT AND SAP	MARCH 2020 EU COUNCIL DECISION ON ENLARGEMENT AND SAP
I	REFORM THE PUBLIC ADMINISTRATION	REFORM THE PUBLIC ADMINISTRATION	TANGIBLE PROGRESS ON REFORMING THE PUBLIC ADMINISTRATION

II	REFORM OF THE JUDICIARY	REFORM OF THE JUDICIARY	CONTINUE THE IMPLEMENTATION OF JUDICIAL REFORM
II.1	Further advancing the re-evaluating of judges & prosecutors, in particular completing all priority dossiers, and finalizing the establishment of the independent judicial structures as foreseen by the Constitutional reform	No change from 2018	Ensure functioning of Constitutional Court and High Court including applicable opinions of Venice Commission
II.2	Finalizing the establishment of specialized bodies, namely the Special Anti-Corruption and Organized Crime Structure (SPAK) and National Bureau of Investigation (NBI) and Court	No change from 2018	Finalize the establishment of the anti-corruption and organized crime specialized structures
II.2.i			Launching of the Special Anti-Corruption and Organized Crime Structure (SPAK);
II.2.ii			Initiation of criminal procedures against judges and prosecutors accused of criminal conduct during the vetting process

III	FIGHT AGAINST CORRUPTION	FIGHT AGAINST CORRUPTION	FIGHT AGAINST CORRUPTION
III.1	Strengthening the track record of proactive investigations, prosecutions and final convictions in the fight against corruption, including at high level	No change from 2018	Initiation of proceedings against those accused of vote buying, fight against corruption and organized crime, including high ranking public officials and politicians

III.1.i			Initiation of proceedings and completion of first proceedings against high ranking public officials and politicians
III.2			Address the Financial Action Task Force recommendations

IV	FIGHT AGAINST ORGANIZED CRIME	FIGHT AGAINST ORGANIZED CRIME	FIGHT AGAINST ORGANIZED CRIME
IV.1	Strengthening the track record of proactive investigations, prosecutions and final convictions in the fight against organized crime, including at high level	No change from 2018	Fight against organized crime, including high ranking public officials and politicians
IV.1.i	Tangible results in dismantling organized criminal networks		Address the Financial Task Force Recommendations
IV.2	Further pursue tangible and sustainable results in countering cultivation and trafficking of drugs		

V	PROTECTION OF HUMAN RIGHTS, INCLUDING RIGHTS OF PERSONS BELONGING TO MINORITIES AND PROPERTY RIGHTS	PROTECTION OF HUMAN RIGHTS, INCLUDING RIGHTS OF PERSONS BELONGING TO MINORITIES AND PROPERTY RIGHTS	PROTECTION OF HUMAN RIGHTS, INCLUDING OF ROMA, AND ANTIDISCRIMINATION POLICIES, AS WELL AS IMPLEMENTING PROPERTY RIGHTS
V.1	Need for effective legislative & policy measures to reinforce protection of human rights & anti-discrimination policies including, the equal treatment of all minorities & access to rights for persons belonging to them, and to ensure consistent implementation of the framework law by addressing in relevant by laws all outstanding issues, including the right to free self-identification	No change from 2018	Further progress in the adoption of the remaining implementing legislation related to the adoption of 2017 framework law on protection of national minorities

V.2	Need for efficient implementation of property rights	No change from 2018	Advancement of the process of registration of properties
V.3			Adoption of law on population census in accordance with Council of Europe recommendations
V.4			Amendment of The Media Law in line with the recommendations of the Venice Commission

VI	ON ELECTIONS, ADDRESSING THE OUTSTANDING RECOMMENDATIONS OF THE OSCE/ODHIR	NO CHANGE FROM 2018	ADOPT ELECTORAL REFORM FULLY IN ACCORDANCE WITH OSCE/ODHIR RECOMMENDATIONS
VI.1			Implementation of the reform of the electoral law
VI.2			Ensuring transparent financing of political parties and electoral campaign finances
VI.3			Final decision on the lawfulness of the local elections of 30 June 2019

VII	REDUCING THE NUMBER OF MANIFESTLY UNFOUNDED ASYLUM APPLICATIONS	NO CHANGE FROM 2018	TOUGHER ACTION AGAINST IRREGULAR MIGRATION / TACKLING UNFOUNDED ASYLUM APPLICATIONS AND ENSURING REPATRIATIONS
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A few issues are worth mentioning with regard to the evolution of EU Conditionality from 2018 to 2020:

- There's constant and increasing emphasis on the obligation to show tangible results in the establishment and functioning of the new Judiciary institutions. However, this condition is far from easy to meet. As the appointment of certain judges depend on the political actors such as the Parliament or the President, this brings us to the conclusion that the Member States are putting considerable pressure on the Albanian political actors to speed up and not block the establishment of new structures and their work. This condition is directed to the political actors and aims the political will;
- EU conditionality requires that the executive branches in charge of the fight against corruption and of the fight against organised crime to function efficiently and deliver tangible results. Here the MS scrutiny is split amongst the: i) local politicians overseeing

the executive branches in charge of the fight against corruption and the fight against organised crime (hence pressure on political will); as well as the ii) state institutions in charge (hence the focus on the efficiency of the public administration (as measured by their good governance);

- There is an obligation for the mainstream political parties to come clean on their party finances and on their electioneering schemes including precise references on eventual law breaks. With this condition the EU Council requests satisfaction regarding the legitimacy of power held by main Albanian political institutions, in addition of asking them to produce satisfactory results on their engagements with EU.

I.2. Reforms and good governance

We posit that the good results of Albania put forward by Commission in its country reports and the problems identified by the Member States are part of the same “good governance mechanism”, but belong to different components of it. The key resides in identifying the difference between “governance” and “good governance”.

“*Governance*”: can generally be described as: i) ensuring interaction and coordination with stakeholders and holding responsible the public politicians and having accountable private business managers for performance; and ii) safeguarding against corruption and conflict of interest; and, promoting transparency. In this view, governance contains and involves a clear political component. “*Good governance*” is more focused on the administrative capacity of the institutions: i) getting the right structures, human resources, systems and tools in place; and ii) making sure responsibilities and tasks are clearly assigned and that staff are motivated and have the competences required to manage the funds. They must also be equipped with the right tools – IT systems, manuals, rules, etc.

When compared, it is the political content that distinguishes governance from good governance: complemented with democratic control and monitoring mechanisms, good governance becomes legitimate governance.

Scheme 1



"Captured institutions do not reflect the interest of the population at large but only of their occupants. As such they are not legitimate. It follows that illegitimate (or perceived as such) institutions cannot be efficient neither produce the required deliverables"

By definition captured institutions do not reflect the interest of the population at large but only of their occupants. As such they are not legitimate. It follows that illegitimate (or perceived as such) institutions cannot be efficient neither produce the required deliverables. Hence in the situation prior to Albania justice reform, the decisions produced by corrupt or captured justice institutions reflected the interest of their "occupants" and not of the society at large. As such they were sub-optimal and were damaging the democratic system in place. From that angle, the good governance concept appends the "political component" on top of its "administrative capacity". It is this model of good governance that we will use in our approach.

While designing the justice reform in Albania, the initial goal was to re-set the existing corrupt, inefficient and dysfunctional justice system, to strengthen the existing institutions and wherever necessary to establish the new efficient ones. A strategy and action plan was designed and indicators were set to that purpose.³ But mid-way and blocked by an absent Constitutional Court and a High Court, it was realized the existence of a Catch22 situation: it was impossible to promote institutional reforms against the will of main political actors.

It is a similar situation all over the SEE6 region. Good governance cannot happen in an institutional environment that does not guarantee full democracy (as illustrated from the Freedom House's downgrading Serbia and Montenegro – from "semi-consolidated democracies" to "hybrid regimes"); that underperforms in human rights and rule of law (as illustrated by the governing by decree during the Covid19 pandemics); or where there is not a critical mass of political will in favour of the institutional changes (as in the skirmishes between the Government, the Parliament and the President for the appointment of the Constitutional Court judges, in Albania).

The addition of the political content in the definition of "good governance" points out the importance of politics in the design, functioning and sustainability of institutions. Weak administrative capacity, missing or incomplete Rules of Procedure, ad-hoc solutions and by-passing of institutional procedures, low transparency, weak fight against corruption, etc., happen because political leaders are not willing to have strong institutions that can question or curtail their will. Hence, the legitimacy of political will becomes key condition for good governance.

"Illegitimate politicians and bad governance go together. They need and reinforce each other in a vicious spiral."

"Catch22 situation: it was impossible to promote institutional reforms against the will of main political actors"

³ The Strategy on the Justice Reform and Action Plan <http://www.reformanedrejtesi.al/dokumenti-strategjik-dhe-plani-i-veprimit>

Illegitimate politicians and bad governance go together. They need and reinforce each other in a vicious spiral. In concrete terms, the lack of political will (or lack of thereof) during planning and implementation of good institutional governance, *can be illustrated by* the failure to adopt strategies, insufficient allocation of financial and human resources; not ensuring independence of institutions or by undermining their work; no commitment to the work of institutions; political interference, etc.

The same logic applies to the establishment of a virtuous circle between political will and good governance. Supported by a legitimate political will, good governance is a legitimate governance, and a legitimate governance provides the *sine-qua-non* conditions for an efficiently-run institution. In a democratic society, the state institutions need to have a democratic legitimacy (respect of human rights, large participation and democratisation) to yield a clear political will. A clear political will is necessary to conduct the required policy-making and produce the desired deliverables in an effective and efficient way.

"Supported by a legitimate political will, good governance is a legitimate governance, and a legitimate governance provides the *sine-qua-non* conditions for an efficiently-run institution"

It results that designing, establishing and efficiently operating legitimate institutions are components of the same good governance mechanism. We cannot have one without the other:

Good governance must ensure that the preferences of the people are translated into political decisions. When the political decision correspond to the preferences of affected people, the institutions are legitimate, and sound (called *input legitimacy*). When those institutions solve the societal problems in an effective and efficient manner, they are well governed. Their political decisions are perceived to be in the interest of the people (called *output legitimacy*).

In conclusion, we cannot have efficient institutions without a legitimate and clear political will. Captured institutions are sub-optimal as they serve the interest of their occupants and not the preferences of the people. The institutional "good governance" reflects and condition the representativeness, quality, efficiency and sustainability of the work of the institutions. It also directly impacts the expected outputs of the deep-cutting reforms in the framework of the country's obligations vis-à-vis EU integration. Most importantly it impacts the choice of partners that EU chooses to work with for the success of reforms. As the old German proverb says "when it becomes necessary to drain the swamp, you don't stand around asking the frogs"⁴.

"Wenn man einen Sumpf trockenlegen will, darf man nicht die Fröche fragen"

1.3. Applying good governance to Justice reform

The justice system and the justice reforms in Albania is a case in point. The conditions put by the Member States and expressed by the European Council declarations acknowledged this

⁴ "Wenn man einen Sumpf trockenlegen will, darf man nicht die Froche fragen".

situation and illustrated the importance of democratic legitimacy of the newly established institutions.

During the last wave, “the EU enlargement policy increasingly focused on improving the output legitimacy dimension of good governance by encouraging administrative reforms through (mostly positive) conditionality and assistance.... Since accession negotiations were only opened when democratic consolidation was well under way in the CEE countries, the EU naturally concentrated on their capacity to effectively implement and apply the *acquis communautaire*”⁵.

"Even if the Enlargement has been one of the most comprehensive foreign policy frameworks encouraging the reforms, the democratic legitimacy component of newly established institutions has not been in the focus of its action"

In its relations with the Western Balkans through the years, the EU support to reform agenda has focused on institution-building complemented with the support for their capacity building. The goal has been to have an efficient state institutional framework capable of designing and implementing efficient policies. However, even if the Enlargement has been one of the most

comprehensive foreign policy frameworks encouraging the reforms, the democratic legitimacy component of newly established institutions has not been in the focus of its action. Institution-, and capacity-building programs have centred on the reform of public administration and of the civil service (and on the management of public finances). The challenges to institutions' legitimacy and representativeness have been acknowledged but dealt mainly through the political dialogue and by an increased role of civil society during their monitoring.

It must be noted that EU actions targeting good governance (or “building capacities of the state”) have covered since some time now the Justice and Home Affairs⁶. In Albania, the CARDS Multi-Annual Indicative Programmes for the period of 2005-2006 has a separate chapter on ‘Good Governance and Institution Building’ that covers justice and home affairs (including justice reform; police, organized crime, terrorism; and asylum and migration), and public administration⁷. Their announced expected results have aimed to “...increase the capacity and efficiency of the Judiciary and increase public confidence⁸” in it.

Output legitimacy and focus on capacity building of EU external action is corroborated by the way IPA is designed. As illustrated by the size of allocations, the EU’s external instruments prioritize the output legitimacy dimension and mainly target the central government through institution

"EU's external instruments prioritize the output legitimacy dimension and mainly target the central government through institution building and support to their functioning"

⁵ "Good governance in the European Union", by Tanja A. Borzel and alii, Jan. 2008, Berlin Working Paper on European Integration No. 7, Freie Universitat Berlin

⁶ CARDS Assistance Program to the western Balkans, REGIONAL STRATEGY PAPER 2002-2006 at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/cards/publications/regional_strategy_paper_en.pdf

⁷ CARDS Assistance to Albania: Multi-annual Indicative Programme 2005-6, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/cards/albania_mip_en_16_11_2004_en.pdf

⁸ Ibid

building and support to their functioning.

Since 2005, policies on “enhancing the performance and functioning of the justice system” in Albania have focused on improving the deliverables of the justice system. The questioning of the legitimacy of Justice institutions have come second.

To clarify the impact that democratic legitimacy of justice system and its efficiency have in its good governance, we can the Borzeel and allii classification to the justice reform in Albania, as below:

- Good governance must ensure that the preferences of the citizen - i.e. *fair and functional justice system* - are translated into political decisions. When the respective political decisions correspond to the preferences of affected citizens, the institutions are legitimate, and sound: or *input legitimacy*.
- When the new Justice institutions *deliver the justice in an effective and efficient manner*, they are well governed. Their political decisions and the subsequent outputs are perceived to be in the interest of the citizen: or *output legitimacy*.

Historically the justice and home affairs, public administration and the judiciary have traditionally been dealt with through the improvement of the institutions. Five Euralius missions since 2005 with a total budget estimated at more than EUR 20MiO underline the focus of EU assistance in Albania on the capacity building and improvement of functioning of justice institutions.

EURALIUS: from Capacity Building to Consolidation of Justice Reform

EURALIUS 1 started promptly in 2005 to 2007 with the aim to *»...building of the required capacities within the Ministry of Justice and the Judiciary”, and had as results “...Law Drafting Manual-for the Codification Department of the Ministry of Justice, Installation of the CCMIS (Civil Case Management Information System), various recommendations for laws/draft-laws/sub legal acts, a Feasibility study on opportunities for applying alternative sentences etc”⁹.*

From 2010, EURALIUS 2 followed with the same main objective *“...the development of a more independent, impartial, efficient, professional, transparent and modern justice system in Albania”*. With regard to outputs, *“...several results achieved during Euralius II mission, were such as “Handbook for trainers-of-trainers for budget officers in judicial institutions of Albania”, Volume I – IV, various trainings and study visits in EU countries, several conferences for the Judges, the Prosecutors, the Ministry of Justice and the civil Servants”¹⁰.*

EURALIUS 3 took over from 2010, with the overall objective *“...the development of a more independent, impartial, efficient, professional, transparent and modern justice system in Albania”*. The most important results achieved were the *“... document on “Final Publication with main results achieved by the project”, Manual on Inspection of Courts, several trainings for different target groups within the Ministry and subordinate institutions, upgrade of the current legislation and several recommendations”¹¹.*

⁹ EURALIUS website, retrieved on 8 July 2020 at: <https://euralius.eu/old/index.php/en/about-us/2015-08-31-09-03-55/euralius-i>

¹⁰ EURALIUS website, retrieved on 8 July 2020 at: <https://euralius.eu/old/index.php/en/about-us/2015-08-31-09-03-55/euralius-ii>

¹¹ EURALIUS website, retrieved on 8 July 2020 at: <https://euralius.eu/old/index.php/en/about-us/2015-08-31-09-03-55/euralius-iii>

EURALIUS 4 covers the period from Sept. 2014 to Dec. 2017, and it includes the Justice reform in its scope of action. Its overall objective is to “...strengthen the independence, transparency, efficiency, accountability and public trust in the Albanian justice system in line with the EU acquis and best practices”. Its outputs are linked “...to the five expected result areas and include a mix of activities ranging from strategic advice to institutional strengthening, supporting legal drafting, training, coaching and mentoring activities, seminars, workshops and study visits to EU Member States”¹².

EURALIUS 5 is ongoing. It “...focuses on supporting Albanian institutions to consolidate the justice system following the comprehensive justice reform”¹³.

The judicial reform, fight against corruption (FAC), and administrative capacity building (ACB) have been preponderant in the attention of European Commission, but in the optic of institution building and reinforcement of their output legitimacy. Reform appears in EURALIUS range of objectives with Euralius 3, and after 10 years of investment in the capacity-building of Albanian justice system.

Moreover, initially the input-legitimacy related issues were planned to be dealt with through *vetting* i.e. the elimination of the “bad apples” that had found their way inside the institutions and the rigorous vetting of new hirings. Although absolutely necessary and welcomed by the citizen, this was revealed to be an incomplete approach as while it eventually get rid the system from bad elements, it does not automatically ensures that the vacancies are filled with good ones. The quality of the new crop depends on the work of vetting structures and on the way they have been set up.

The Justice reform acknowledged the problems affecting the independence and the impartiality in the Albanian judicial system. Reform promoters designed the new justice system with the independence of the judiciary as the main condition, independent form the legislative and the executive powers. Consequently justice reform in Albania is the first meaningful effort to restore the legitimacy of the judicial branch and at the same time radically improve its deliverables.

"Justice reform in Albania is the first meaningful effort to restore the legitimacy of the judicial branch and at the same time radically improve its deliverables"

I.4. EU Commission and the Member States

By making the organisation of the 1st Intergovernmental Conference conditional to fulfilment of good governance benchmarks, EU puts good governance at the centre of EU action to Albania. In the WB6 scale, the decision to open first and close last the Fundamentals chapter, underlines the systemic importance put on the non-reversibility of democratic achievements induced during the Enlargement process.

To improve the standards of democratic governance in third countries EU uses a set of foreign policy instruments. They are composed by the political dialogue, conditionality and assistance. “*Conditionality and political dialogue seek to alter the target actors’ preferences over strategies and outcomes, respectively, in favour of introducing domestic reforms. Assistance, by contrast,*

¹² EURALIUS website, retrieved on 8 July 2020 at: <https://euralius.eu/old/index.php/en/about-us/2015-08-31-09-03-55/euralius-iv>

¹³ EURALIUS website, retrieved on 8 July 2020 at: <https://euralius.eu/index.php/en/>

aims at strengthening their capacity to undertake necessary changes"¹⁴.

Each instrument comes with its own influence mechanism, as below:

Instrument	Influence mechanism
Political dialogue	social learning and persuasion
Conditionality	manipulation of cost-benefit analysis
Assistance	capacity & institution building

In the Enlargement debate, it is the conditionality that has been the *maître mot* of EU actions. Progress in the accession path and the resulting increase (or decrease, at least in theory) of the financial assistance has been the most talked-about instrument that EU has used. But during last few years and especially during 2019 the debate about the EU approach to conditionality has evolved in two directions:

- From *chapter-based and normative methodology*, where Candidate countries are responsible to deliver the agreed-upon outcomes and the Commission is responsible for controlling and reporting through Country Reports; towards reform-based, more political, and impact-oriented approach. We argue that the 2020 Revised Enlargement Methodology (REM) conditionality shift towards the Fundamentals reflects the acceptance from the EU of the difficulty to obtain sustainable and efficient institutions without the necessary guarantees that the advances in state-building through deep-cutting reforms are irreversible.
- From the *EU Commission as designer, monitor and reporter* towards an increasing role and weight of Member States domestic politics in all of the above. Member States increasingly participate in the process of setting the benchmarks, scrutinizing the deliverables, and deciding about the candidate country progress (i.e. the nine Bundestag conditions, the Dutch parliament and / or local government concerns on Albania organized crime, or the French decision to block the official opening of Enlargement negotiations with Albania and North Macedonia). Meanwhile the rewards are getting blurred – the EU full membership for SEE6 countries has never looked further away.

"Developments in the Revised Enlargement methodology point towards a: i) larger role of the EU Member States in the current Enlargement process, and for an; ii) an increase in the importance of the fundamentals (or of the components of inputdemocratic legitimacy)"

Both developments in the Revised Enlargement methodology point towards a: i) larger role of the EU Member States in the current Enlargement process, and for an; ii) increase in the importance of the fundamentals (or of democratic legitimacy). The 2020 Methodology confirms this shift with the role that it foresees for MS in monitoring on the ground, in reporting and in intervening through bilateral assistance in selected sectors.

By looking at the nature of demands brought by the German Bundestag, the Netherlands government or

¹⁴ "Good governance in the European Union", by Tanja A. Borzel and alii, Jan. 2008, Berlin Working Paper on European Integration No. 7, Freie Universitat Berlin

the French Presidency, we observe that MS have increasingly acquired a larger role in holding SEE6 politicians accountable. It is Member States now that have to say their word if the democratic control in SEE6 is properly exercised or if representativeness is functioning (democracy and Rule of Law); and if the quality of the deliverables that the new institutions are producing is acceptable (do the WB6 institutions produce satisfactory and efficient outcomes).

In Albania, the shift towards Fundamentals and the increased role of MS is translated into a longer and more complex Enlargement process. Since 2016 the advancement of reforms - with special emphasis of the justice reform – has become Enlargement main benchmark. However, a slow progress of Justice reform and the accompanying political disputes jeopardizing its swift outcomes have adversely impacted the EU assessment towards opening of the negotiations.

We noted that from 2018 while the reforms in Fundamentals and the increased efficiency of new institutions were always part of EU conditions, the focus of European control shifted from the performance of new institutions to their democratic legitimacy (see Table 1). The MS complained and required additional assurances were on the capture of new democratic institutions, their missing representativeness, their governance, or their accountability.

Put it otherwise, when proposing the opening of EU negotiations for Albania the Commission has been validating the deliverables of the reformed institutional framework, while the MS were not happy with their democratic nature. This explains the long list of conditions put by the EU council in its Decision in Enlargement in March 2020.

Both are right.

I.5. Enlargement Frontrunners and the Reform Frontrunner

In order to establish a more informed approach on the path of the justice reform in Albania and on its implications toward fulfilling the criteria set by the EU institutions and MS, a regional approach would be useful. Serbia and Montenegro are the Western Balkan candidate countries that have started accession negotiations respectively since 2012 and 2013.

In the process of setting up the appropriate Judicial structures and tools and of establishing institutional good governance, and engaging towards the expected outcomes, a comparative assessment helps. The table below aims to set side by side the core structures and institutions introduced by the Reform in the Judicial System in Albania since 2016, with those of their counterparts / potential counterparts in both Montenegro and Serbia.

While every comparison must take into account the specificities of each country's context, it still provides helpful clues on the nature, depth and magnitude of the reform going on in Albania compared to other countries, and on the challenges that lie ahead. First, while the Reform on the Judicial System in Albania is currently being implemented and the new institutional set-up is being established, Montenegro and Serbia face other challenges in the process of complying with the requirements of EU integration in matters of Chapter 23.

From the normative point of view, in the case of Montenegro, constitutional amendments are yet to be adopted. They need to address in part the governing of the judiciary in line with the opinion of the Venice Commission, particularly as regards the composition of the Judicial Council, election of the President of the Supreme Court, election of public prosecutors and of the Supreme Public Prosecutor, composition of the Prosecutorial Council, reasons for dismissal of judges and public prosecutors, or the composition and method of election of judges of the

Constitutional Court.¹⁵ Similarly, in Serbia, a deeper reform in the judiciary shall be introduced by the Constitutional amendments expected to be adopted by 2020,¹⁶ which aim at strengthening the independence of the judiciary and the autonomy of the prosecution.¹⁷

In both Enlargement frontrunner countries important changes remain to be done through constitutional amendment of their Constitution. The progress in Chap. 23 and 24 has been noticed in the *output legitimacy* component. The progress in complying with the requirements of Chap. 23 are still highly dependable from the *input legitimacy*, such as the whole political process of adopting constitutional changes.

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Table 2. A comparative overview of the core institutions introduced by the Reform in Judicial System in Albania and their counterparts/potential counterparts in Montenegro and Serbia

	ALB	MNE	SER	Notes
Judicial Governance Bodies				<p>In Albania, the new institutional architecture of the judicial governance bodies was introduced by the constitutional amendments of 2016. This mainly aims to reduce the political influence in the functioning of the judiciary. Therefore, <i>inter alia</i> none of the members of both councils is either a member of the Government (such as the Minister of Justice) or a member of the Parliament.</p> <p>The composition of the councils in both MNE and SER is different. This is also due to the membership <i>ex officio</i> of the Minister of Justice in the councils. Also, in the case of Serbia the Chairperson of the competent Committee of the National Assembly is also an <i>ex officio</i> member of both councils.¹⁸</p>

¹⁵ Government of the Republic of Montenegro. Action Plan for Chapter 23 - Judiciary And Fundamental Rights Semi-Annual Report, July – December 2018, pg. 4

¹⁶ As declared by the Minister of Justice Nela Kuburović of the Republic of Serbia, the new Parliament, following the 2020 elections, will make the final decision on such amendments. Source: Serbia's constitutional reform: Professionalism of judiciary trapped by politics, <https://europeanwesternbalkans.com/2019/09/16/serbias-constitutional-reform-professionalisation-of-judiciary-trapped-by-politics/>

¹⁷ European Commission Report Serbia 2019, pg. 13

¹⁸ Law on the State Prosecutorial Council, Serbia, article 5 para. 2, Constitution of the Republic of Serbia art. 153 para. 3

				<p>Despite being established earlier on, the governance bodies in Montenegro and Serbia are presumably still not performing at the highest attainable standards. EU Commission has stressed that Serbia shall ensure both in law (in the context of the ongoing constitutional reform) and in practice that the High Judicial Council and the State Prosecutorial Council can fully assume their role and achieve an independent and efficient judicial administration in line with European standards.¹⁹</p> <p>As to Montenegro, the adoption of the amendments of the Law on the Judiciary in 2019 has served as a temporary anti-deadlock mechanism to ensure the continuous functioning of the Judicial Council in light of the lack of the parliamentary majority to appoint the new members.²⁰ Following the adoption of the law, it is expected an increased capacity of the Judicial and Prosecutorial Councils to implement the systems for recruitment, professional assessment, promotion and disciplinary accountability.</p>
The High Judicial	Exists	Exists	Exists	
High Prosecution Council	Exists	Exists	Exists	
High Justice Inspector	Exists	Does not exist	Does not exist	<p>Except in Albania, there are no specific separate institutions bearing the competence to initiate disciplinary proceedings for judges and prosecutors. In both Montenegro and Serbia the competence to initiate a disciplinary proceeding against a judge or prosecutor has been granted to various institutions.</p> <p>In Serbia, the initiation of disciplinary proceedings against prosecutors shall be initiated upon a proposal by the public prosecutor, immediately superior public prosecutor, Republican Public Prosecutor, Minister responsible for the judiciary, the authority responsible for evaluating performance and the Disciplinary Commission. The procedure for dismissing a public prosecutor or deputy public prosecutor may also be initiated by the State Prosecutors Council <i>ex officio</i>.²¹ In the case of disciplinary proceedings against a judge, the process is initiated by the Disciplinary Prosecutor.²²</p> <p>In Montenegro, any person may submit a request to a Disciplinary Committee to initiate a proceeding on the disciplinary liability of a judge.²³ In cases of disciplinary</p>

¹⁹ European Commission Report Serbia 2019, pg. 13

²⁰ European Commission Report Montenegro 2019, pg. 16

²¹ Law on the State Prosecution Office of the Republic of Serbia, art. 94 para. 2

²² The Law on Judges of the Republic of the Republic of Serbia, art. 93 para. 1

²³ Law on the Judicial Council of the Republic of Montenegro, art. 54 para. 1

				proceedings against a prosecutor the proposal may be submitted by the Minister of Justice for the Chief State Prosecutor, the Chief State Prosecutor, High State Prosecutor and Basic State Prosecutor for their Deputies, the Chief State Prosecutor for the High State Prosecutor and Basic State Prosecutor, and by the Higher State Prosecutor for the Basic State Prosecutor. ²⁴
The Judicial Appointment Council	Exists	Does not exist	Does not exist	The Judicial Appointment Council is a particularity of the Albanian system, established due to the need for de-politization of the process of appointment of the Constitutional Court judges. ²⁵ There are no specific <i>ad hoc</i> institutions performing similar functions in Montenegro and Serbia.
Special Institutions in the fight against corruption and organised crime				
Special Prosecutor's Office	Exists	Exists	Exists	<p>The Special Prosecutor's Office for the fight against organised crime and corruption in Albania shall function as a separate constitutional institution, which is not subordinated to the Attorney General.</p> <p>In Serbia, within the Republic Public Prosecutor Office, there are public prosecutor's offices with special jurisdiction, such as the Prosecutor's Office for Organized Crime and the Prosecutor's Office for War Crimes. Moreover, an Anti-Corruption Department was established in 2008 within the Republic Public Prosecutor's Office whereas in 2010 the Appellate Public Prosecutors and the Higher Public Prosecutor in Belgrade, Novi Sad, Kragujevac and Niš have formed the departments for combating corruption and money laundering.²⁶ Additionally, in the Higher Prosecutors' Offices in Kraljevo, Niš, Novi Sad and Belgrade there are specific departments assigned with the fight against corruption.</p> <p>As to Montenegro, within the Chief State Prosecutor's Office, a Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes, headed by the Special Prosecutor for the purpose of carrying out activities aimed at suppression of organised crime, corruption, terrorism and war crimes.²⁷</p>

²⁴ Law On the State Prosecutor's Office of the Republic of Montenegro, art.42 para 2

²⁵ Assembly of the Republic of Albania, Strategy of the Reform in the Judicial System, pg. 7 Among the objectives of the Reform on the Justice System it is establishing well-defined rules for the process of appointing Constitutional Court judges, as well ensuring a process of appointment free from political influence.

²⁶ Public Prosecutor's Office, Republic of Serbia, Introduction <http://www.rjt.gov.rs/en/organization/about-rppo/introduction->

²⁷ Law on the State's Prosecution Office of Montenegro, art. 66

The Special Investigation Unit (National Investigation Bureau)	Exists	Exists	Does not exist	In Serbia, a department for the fight against corruption is operating within the Criminal Police Directorate, and dedicated bodies have been established in the same cities where there is a Higher Prosecutor's Office. ²⁸ In Montenegro, a Special Police Unit supports the Special Prosecutor's Office.
Special Court for Corruption and Organized Crime & Special Court of Appeals for Corruption and Organized Crime	Exist	Do not exist	Do not exist	Both in Montenegro and Serbia there are no specific courts dealing with cases of corruption and organised crime. ²⁹ However, in the case of Montenegro, irrespective of the rules on territorial jurisdiction, the High Court in Podgorica is responsible for adjudicating on criminal proceedings on organized crime, regardless of the sentence, and High-level corruption. ³⁰
Ad hoc institutions for the re-evaluation of judges and prosecutors				Albania is the only country where an <i>ad hoc</i> institutional set-up has been established for the re-evaluation of judges and prosecutors. In Serbia, in 2009, the High Judicial Council announced 2 483 open positions for judges in the courts of general and specialized competence; 5 030 applications were filed over half of which were submitted by sitting judges. Out of them only 1 531 judges were reappointed. One third of the sitting judges were not reappointed and the total number of judges was reduced by one quarter. ³¹ Throughout the process, substantial fair trial rights were infringed, including the right to a hearing, the right to get notified, and failure to deliver a reasoned decision. The collective decision of the High Judicial Council was quashed by the Constitutional Court, as contrary to the constitutional principles of fair trial. ³² The European Commission considered that this procedure was carried out in a non-transparent way, putting at risk the principle of the independent judiciary" ³³
Independent Qualifications Commission	Exist	Does not exist	Does not exist	
Special Appeals Chamber	Exist	Does not exist	Does not exist	

²⁸ European Commission Report 2019 Montenegro, 2019, pg. 21

²⁹ The Court system in Serbia <https://www.vk.sud.rs/en/organizational-structure-courts>

³⁰ The Courts of Montenegro, Jurisdiction. <http://en.sudovi.me/vrhs/judicial-power/jurisdiction/>

³¹ Centre for Legal Research and Analysis, *Vetting of judges in young democracies: Comparative analysis of Vetting in Albania, Bosnia and Herzegovina, Serbia and Macedonia*, funded by the Kingdom of the Netherlands, pg. 26

³² *Ibid.*

³³ European Commission, Progress Report for Serbia 2010, 9 November 2010, Sec(2010) 1330, p. 10

Public Commissioner	Exist	Does not exist	Does not exist	
International Monitoring Operation	Exist	Does not exist	Does not exist	
Re-organisation of existing institutions				
Constitutional Court	Exists	Exists	Exists	The appointment of the judges of the Constitutional Court has undergone significant changes in Albania. The appointing bodies are similar to those stipulated in Serbia. Namely, five justices of the Constitutional Court of Serbia shall be appointed by the National Assembly, another five by the President of the Republic, and another five at the general session of the Supreme Court of Cassation. ³⁴ In the case of Montenegro the judges are elected by the Parliament. ³⁵
Supreme Court	Exists	Exists	Exists	Both in Albania and Montenegro the election of the Supreme Court judges does not include the involvement of the Assembly. In Albania, following the Judiciary Reform the Supreme Court members are appointed by the President of the Republic, based on the proposal from the High Judicial Council ³⁶ , whereas in Montenegro the judges of the Supreme Court are appointed by the High Judicial Council. ³⁷ In Serbia, judges of the Supreme Court of Cassation are appointed by the Assembly. ³⁸
General Prosecution Office	Exists	Exists	Exists	In Albania, following the Judicial Reform, the General Prosecution Office has no longer jurisdiction in cases of corruption and organised crime, whereas in both Montenegro and Serbia the Special Prosecutors perform their competences while being subordinated to the State Prosecutor's Office.

In the case of Albania, the constitutional process of reorganizing the judiciary has already taken place before the official opening of the EU Negotiations, and currently is at its implementation stage. Many new institutions have been established or reorganized, as compared to other countries in the region. Albania can be considered as a reform frontrunner.

³⁴ Constitution of the Republic of Serbia, art. 172 para. 2

³⁵ Constitution of the Republic of Montenegro, art. 153 para. 2

³⁶ Constitution of the Republic of Albania, art. 136 para. 1

³⁷ Constitution of the Republic of Montenegro, art. 124

³⁸ Constitution of the Republic of Serbia, art. 147

Its challenges now have shifted towards the functioning and efficiency of the newly established structures. As a result, the process of frontloading of conditionality has allowed Albania to mark a significant progress in the input-legitimacy areas covered by Chapters 23, even if the accession negotiations with the EU have not been officially opened yet.

On the other side, both Enlargement frontrunners - Serbia and Montenegro - face challenges on the component of input legitimacy such as: i) need to provide assurances about the lack of autonomy of the Judicial and Prosecutorial councils from the executive and legislative branches; and, ii) complement the progress achieved in the set up and administration of justice structures with the necessary constitutional changes - this presupposes mobilization of political support from citizen and from the whole political spectre.

"The process of frontloading of conditionality has allowed Albania to mark a significant progress in the input-legitimacy areas covered by Chapters 23, even if the accession negotiations with the EU have not been officially opened yet"

Chapter 2

II. FRONTLOADING CHAPTER 23: FOCUSING ON JUSTICE REFORM

The justice reform is the first meaningful effort to restore the legitimacy of the judicial branch and at the same time radically improve its deliverables. For the public at large, the judicial reform was initially understood as the vetting process – “*catching the big fish*” clearly defined it as an output-oriented process. It is during the next phase i.e. the set up of and operating the new Justice institutions – where the main problems – mostly linked to the legitimacy and representativeness of new institutions and of the proposed candidates - started to emerge.

Until now, no comprehensive research has been conducted on the Justice reform policy-making cycle that culminated with the adoption of Constitutional amendments, and with the underlying political support needed for such adoption.

"With the hindsight, in the case of Justice reform, it appears that the missing will of Albanian political elites in implementing the reform following the constitutional amendments was not appropriately factored in reform design and planning"

With the hindsight, in the case of Justice reform, it appears that the missing will of Albanian political elites in implementing the reform following the constitutional amendments was not appropriately factored in reform design and planning.

The impact of good governance in the establishment and running of Judicial institutions either created by the reform or involved in them serves to underline the importance that the design of a sector reform has on its success. The other systemic condition for a favourable outcome is the existence of the right democratic context.

II.1. Adapting the National Institutional Framework

Differently from Montenegro and Serbia, in Albania the Justice Reform started by amending almost 1/3rd of the Constitution (on 22 July 2016). The scope of these amendments was a deep reorganisation of the institutional set up and of the functioning of the judicial branch. These amendments envisaged the establishment of new institutions governing the judiciary, of new institutions for the fight against corruption and organised crime, as well as a one-of-the-kind system of vetting of judges and prosecutors. The constitutional amendments also provided significant changes in order to improve the performance of the judiciary and reinstate the public trust in the judiciary. In this regard, the Assembly considered crucial the process of strengthening the independence of constitutional bodies and those

"Differently from Montenegro and Serbia, in Albania the Justice Reform started by amending almost 1/3rd of the Constitution..."

established by law, as one of the core engagements in the framework of European Integration.³⁹ But it is their operation and final outputs that will serve as a basis for assessing the fulfillment of the EU negotiations opening benchmarks.

The new Judicial institutional set up may be divided into three categories: judicial governance bodies, the new institutions for the fight against corruption and organised crime, and the vetting institutions.

i. New judicial governance bodies

The *High Judicial Council* is an independent institution established by the constitutional amendments of 2016 and it has been established with the view to replace the former High Council of Justice. The Council is responsible for appointing, evaluating, promoting and transferring judges of all levels, proposing to the President of the Republic the candidates for judges of the Supreme Court, including other competences as stipulated by the Constitution and the legal framework regulating the institutions governing the judiciary⁴⁰.

The Council is composed of 11 members, six of whom are elected by the judges of all levels of the judiciary, and five members are elected by the Assembly among lawyers who are not judges. They serve a 5-year term⁴¹. The composition of the Council is designed as such as granting enhanced independence from political will.⁴² To avoid any political interference, and in contrast to the former HCJ neither the PoR, nor the MoJ are members of the HJC. Nevertheless, the MoJ may participate in the meetings of the HJC when issues of strategic planning and budget are discussed, but does not have voting rights or any responsibility towards inspection and evaluation of judges.⁴³

The *High Prosecution Council* is in charge of guaranteeing the independence, accountability, the status, and career of prosecutors in the Republic of Albania. The HPC is vested with the competence to appoint, evaluate, promote and transfer prosecutors of all levels, as well as on cases of disciplinary misconduct by the latter. The HPC bears a special competence to propose to the Assembly the candidates for Prosecutor General (PG), and other competences included in the Constitution and the law on the institutions governing the judiciary.⁴⁴ The HPC is composed of 11 members, elected for a 5 year term, six of whom are selected amongst prosecutors of all levels, and five of them are elected by the Assembly among lawyers coming out of the judicial or prosecution system.⁴⁵

High Justice Inspector is also a new organ governing the judiciary responsible for the verification of complaints, the investigation of violations on its own initiative, and the initiation of disciplinary proceedings against judges and prosecutors of all levels, as well as members of the

³⁹ Assembly Resolution ‘On the progress of Albania in the process of European Integration during year 2018’ dated 11.04.2019

⁴⁰ Constitution art. 147 para 1 and 147/a para 1, 2 and 3 as well as Law 115/2016 “On governance institutions of the justice system”

⁴¹ Constitution Art. 147/b para 1

⁴² European Commission Albania Report 2016, pg. 14 https://ec.europa.eu/sites/near/files/pdf/key_documents/201611...

⁴³ Idem. pg. 18

⁴⁴ Constitution Art. 149 para 1 and 149/a

⁴⁵ Constitution Art. 149

HJC, HPC and the PG.⁴⁶ Following an investigation, the HJI may initiate proceedings against a judge or prosecutor before the HJC or the HPC. As such, the initiation of disciplinary proceedings is no longer a competence of the Ministry of Justice or of the former Inspectorate of the High Council of Justice. The High Inspector is elected by a 3/5 majority of all members of the Assembly, for a nine-year term.⁴⁷

Judicial Appointment Council is new *ad hoc* institution that is vested with the competence to verify the fulfilment of legal requirements and the assessment of professional and moral criteria of the candidates for the High Justice Inspector and the members of the Constitutional Court.⁴⁸ JAC is composed of nine members selected among judges and prosecutors, who are not under any disciplinary measures.⁴⁹ The PoR shall select based on a lottery the members of the JAC between 1 and 5 December of each calendar year. The mandate of members to the JAC is one year and it starts on 1st of January of each calendar year.⁵⁰ The main rationale behind the establishment of this institution is ensuring a fair process of selection and ranking of candidates as well as preventing politicization in the process of appointments to the CC and the HJI.⁵¹

The *School of Magistrates* is not a newly established institution. However, its functioning was significantly enhanced following the constitutional amendments and laws on governance judicial institutions. The School is an independent body that shall conduct the process of initial training of candidates for judges and prosecutors, and the continuous training of judges and prosecutors in office. The changes include the procedure and criteria for recruiting new magistrates, and the broadening of the category of subjects that should undergo the training at the SoM.⁵²

ii. The new institutions for the fight against corruption and organised crime

One of the pillars of the justice reform was the strengthening of the fight against corruption and organised crime. For this purpose, the constitutional amendments and the subsequently adopted legal framework foresee the establishment of a Special Prosecution structure for the fight against Corruption and Organised Crime (SPCOC), and of a Special Investigation Unit called the National Bureau of Investigation (NBI), both of which constitute the “Special Anti-Corruption and Organized Crime Structure” (SPAK).⁵³

The rationale behind these amendments is the creation of structures with a special mandate to fight endemic corruption and organized crime, free from political influence, and from the influence of the PG.

SPCOC conducts the criminal prosecution and investigation of the criminal offenses of corruption, organized crime and criminal offences committed by high ranking state officials, such as the PoR, Speaker of the Assembly, Prime Minister, the member of the Council of

⁴⁶ Constitution Art. 147/d para. 1

⁴⁷ Constitution Art. 147/d para 3.

⁴⁸ Constitution Art. 149/d para 1

⁴⁹ Constitution Art. 149/d para 3

⁵⁰ Constitution Art. 149/d para 4

⁵¹ European Commission Albania Report 2016, pg. 15

⁵² Law 115/2016 Art. 244 Along with candidates for judges and prosecutors, the SoM shall train the state advocates, court chancellors and clerks.

⁵³ Law 95/2016 “On the organization and functioning of institutions for combating corruption and organized crime”

Ministers, the judges of the CC and SC, the PG, HJI, the Mayors, members of the Assembly, deputy ministers, the members of the HJC and HPC, and heads of central or independent institutions as defined by the Constitution or by law, including charges against the former officials mentioned above.⁵⁴

The SPCOC investigates and prosecutes any other offense that is closely related to the investigation or criminal case within its competences. The SPCOC represents the accusation before the SCCOC and the SC.⁵⁵ The SPCOC shall consist of at least 10 prosecutors, who shall be appointed by the HPC for a 9-year term.⁵⁶ It is completely independent from the Prosecutor General⁵⁷. As of May 2020, the Special Prosecution is composed of 11 prosecutors.

The *Special Investigation Unit/NBI* is a specialized section of the judicial police investigating criminal offences under the jurisdiction of the SPCOC. The NBI Director, the investigators and its Judicial Police Services are supervised by and operate under the direction of the special prosecutors of SPCOC.⁵⁸

The *Special Courts for Corruption and Organized Crime* and the *Special Court of Appeals for Corruption and Organized Crime (SCCOC)* are newly established structures resulting from 2016 constitutional amendments and they substitute the Serious Crime Courts. The judges of the latter will be transferred as judges of the SCCOC, until the re-evaluation process for these judges will be concluded.⁵⁹

iii. The institutions for the re-evaluation of judges and prosecutors (vetting)

"The establishment of a system for re-evaluation of judges and prosecutors (vetting) is the main novelty of the constitutional amendments. Its underlying rationale is based on the necessity to guarantee the functioning of the rule of law, the independence of the judicial system, and to re-establish the public trust and confidence in the judiciary"

The establishment of a system for re-evaluation of judges and prosecutors (vetting) is the main novelty of the constitutional amendments. Its underlying rationale is based on the necessity to guarantee the functioning of the rule of law, the independence of the judicial system, and to re-establish the public trust and confidence in the judiciary.⁶⁰ The vetting institutions are the following:

The Independent Qualification Commission is an independent body investigating and deciding in the first instance of re-evaluation of judges and prosecutors. The Commission is composed of four panels with three members each. They are appointed by the Assembly after a screening of

⁵⁴ Constitution Art. 135 para 2 and Art. 148/4

⁵⁵ Constitution Art. 148/dh para 1

⁵⁶ Constitution 148/dh para 2

⁵⁷ Law 95/2016 "On the organization and functioning of institutions for combating corruption and organized crime" Art. 3 para 7

⁵⁸ Law 95/2016 "On the organization and functioning of institutions for combating corruption and organized crime" Art. 5 para 3

⁵⁹ HJC Annual Report 2018, pg. 56 www.klgj.al

⁶⁰ Constitution, Art. 179/b & the Annex of the Constitution

the candidates made by the Constitutionally-sanctioned International Monitoring Operation (IMO).⁶¹ The mandate of the members of the IQC and of the Public Commissioners (PC) expires after five years from the date of commencement of their operation.⁶²

The Special Appeals Chamber hears the appeals on the decisions of the Commission. Moreover, it is vested with the competence to decide on the disciplinary misconducts of CC judges, of the members of HJC, of HPC, of PG, and of the HJI.⁶³ It is composed of 7 judges appointed of a 9-years term.⁶⁴ The members of the SAC are appointed by the Assembly following a screening by IMO.⁶⁵

The Public Commissioners represent the public interest throughout the re-evaluation process. Based on such mission the Public Commission shall file appeals to the SAC, in cases they find a violation of the Constitution, or the legal provisions on the re-evaluation process.

The International Monitoring Operation is a consortium of partners within the framework of the European integration process and of Euro-Atlantic cooperation, led by the European Commission.⁶⁶ Senior experts from the judiciaries of EU member states and the U.S. carry the daily work on the ground and support its activities.⁶⁷ IMO monitors and oversees the process of the re-evaluation. The international observers may present written recommendations to the PC to file an appeal for a particular decision of the IQC and submit findings and opinions on the cases examined by the vetting institutions.⁶⁸

The vetting institutions conduct the process of re-evaluation of judges - including judges of the CC and SC; all prosecutors - including the PG, the former Chief Inspector and other inspectors of the former HCJ; the legal advisors at the CC and SC, legal advisors at administrative courts and at the Office of the PG.⁶⁹ The assesses are subject to a three-fold system of re-evaluation, which includes: i) the control of assets, ii) their integrity (ties with organised crime), and iii) their professional proficiency. In case the Independent Qualification Commission after conducting a thorough investigation reaches the conclusions that evidence collected is sufficient to constitute proof for dismissal or suspension, the burden of proof is shifted to the subject of re-evaluation who must prove the contrary. If the latter fails to do so, the findings are considered valid and the subject is dismissed, or suspended.⁷⁰

iv. Reorganisation of the Constitutional Court, Supreme Court, and the Prosecutor General

Apart from establishing new institutions, the Constitutional amendments of 2016 brought significant changes to the organisation and functioning of the Constitutional Court, of the

⁶¹ Constitution Annex, Article C Para. 6-12

⁶² Constitution Art. 179/b Para. 8

⁶³ Law 84/2016 "On the re-evaluation of judges and prosecutors in the Republic of Albania"

⁶⁴ Constitution Art. 179/b Para. 5

⁶⁵ Constitution Annex, Article C Para 6-12

⁶⁶ Constitution Annex, Article B Para 1

⁶⁷ EEAS, at: https://eeas.europa.eu/delegations/cuba/20144/most-frequently-asked-questions-international-monitoring-operation_en

⁶⁸ Constitution Annex, Article B

⁶⁹ Constitution Art. 179/b para. 3 of the Albanian Constitution..

⁷⁰ Constitution Annex Art. D, Dh, E

Supreme Court and the office of Prosecutor General. The common denominator of all those changes was the elimination of institutional capture. The mechanism designed to achieve this objective was the selection, nomination, vetting, and approval of candidates.

As the constitutional body vested with the competence to settle constitutional disputes and ensuring the final interpretation of the Constitution⁷¹, the *Constitutional Court* is composed of 9 judges. Three of them have to be appointed by the Assembly, three by the President of the Republic, and three by the Supreme Court – all candidates should be ranked among the three first in a list prepared and vetted by the Justice Appointments Council⁷².

As to the Supreme Court, based on the constitutional amendments, the judges are appointed by the President of the Republic based on the proposal of the HJC, for a 9-year term, without the right to re-appointment.⁷³ The Court is composed of judges coming from courts of appeals or courts of first instance and other members, even non-judges such as prominent lawyers. However, the latter can constitute only one-fifth of the members of the Court.⁷⁴

The Prosecutor General is appointed by three-fifths of the members of Assembly among three candidates proposed by the HPC, for a seven-year mandate, without the right to re-appointment.⁷⁵ Compared to the former constitutional provisions, the amendments introduced the qualified majority for the appointment of the Prosecutor General, as well as the process of pre-selection by the High Council of the Prosecution. The Prosecutor General should not necessarily come from among the prosecutors of all ranks - the candidate can also be a prominent lawyer with not less than 15 years of professional experience, with high moral and professional integrity.⁷⁶

II.2. Preparing for Chap 23: a tentative list of opening benchmarks for Albania

The adoption of the above changes has required the modification of almost 1/3rd of Albanian Constitution. This represents a significant progress in meeting the conditions included in the Fundamentals clusters of the REM. Which means that in the case of Albania, the frontloading of Justice reform conditions has allowed for a significant progress to take place before the official opening of Chap. 23. As a result, differently from the frontrunners Serbia and Montenegro, the setting of opening benchmarks for Albania's Chapter 23 will aim mainly the monitoring of the functioning of already newly established institutions. The country has gone already through the constitutional changes required to enable the closure of Chap 23 and 24.

"In the case of Albania, the frontloading of Justice reforms conditions has allowed for a significant progress to take place before the official opening of Chap. 23."

⁷¹ Constitution Art. 124 para 1

⁷² Constitution Art. 125 para 1

⁷³ Constitution Art. 136 para 1

⁷⁴ Constitution Art. 136 para 3

⁷⁵ Constitution Art. 148/a para 1

⁷⁶ Constitution Art. Para 2 and 3

"With the REM, we see an evolution of the country benchmarks profile. For Albania they will deal mainly with the *output-legitimacy*, and will focus on the independent, efficient, transparent, account and professional features of new justice structures. For Serbia and Montenegro they are focusing on *input legitimacy* i.e. getting their political class to change the Constitution and obtain the citizen support. For all WB6 countries reform sustainability and non-reversibility have become paramount conditions"

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Based on previous waves of opening Chapter 23 negotiations, the opening benchmarks for Serbia and Montenegro were specifically tailored with respect to the rule of law conditionality, and to the specific

issues or concerns with the candidate country in question. Following the frontrunners example, and adapting to the characteristics of the judicial system in Albania – including the ongoing justice Reform - a tentative list of benchmarks with regard to the judiciary in Albania might be summarized as follows:

A) Independence, impartiality and legitimacy (input)

- a) Functionalization of new and revamped institutions governing the judiciary, and prevention of political appropriation of the appointment process of judges
- b) Improve the organisational independence by strengthening the capacities of the institutions of the judiciary and governance institutions with financial and HR resources
- c) Establish the full range of “good governance mechanisms” in all Judicial institutions and structures, starting with Integrity Compliance rules, and keep pressure on the implementation of the above;
- d) Continue a “non-captured” and independent process of appointment of judges and prosecutors at the CC, SC, and GP, and functionalization of all three institutions
- e) Enhance transparency of the institutions within the judiciary

B) Accountability (output)

- a) Ensure the proper regulatory framework for conducting the process of disciplinary proceedings against judges and prosecutors.
- b) Establish a track record of disciplinary proceedings initiated or concluded against judges and prosecutors

- c) Establish and reinforce peer-to-peer connections with EU colleagues for exchange of experience and peer-to-peer scrutiny

C) Professionalism (output)

- a) Ensure a fair system of recruitment and initial training of candidates for judges and prosecutors
- b) Increase the capacities of the School of Magistrates
- c) Set-up a system of periodic evaluation of judges and prosecutors

D) Efficiency⁷⁷ (output)

- a) Complete the set up of new structures with Organogram, ToRs for every position, Rules of Procedure, etc;
- b) Adoption of a backlog reduction plan and beginning of its implementation
- c) Creation of judicial maps supporting access to justice
- d) Undertake measure to create a functioning court case management systems

E) Sustainability (throughput)

"Given the overarching scope of institutional changes, we estimate that parallel to the design of opening benchmarks, it is useful to better understand and assess the informal, societal and intangible underlying reasons that condition the good governance of the new structures"

- a) Prepare and adopt a mid-term and long-term plan of HR and of finance for every Justice institution;
- b) Analyse availability of local resources in HR and finance, and worst-case scenarios;
- c) Prepare phasing-out plan of external actors from Justice reform, and plan accordingly.

Given the overarching scope of institutional changes, we estimate that parallel to the design of opening benchmarks, it is useful to better understand and assess the informal, societal and intangible underlying reasons that condition the good governance of the new structures. This exercise should highlight the impact at local level down to the Albanian citizen as well as the detail the incentives of political actors; and highlight the importance of processes in achieving better governance of justice system⁷⁸.

⁷⁷ Based on the European Commission for the Efficiency of Justice (CEPEJ) - Guidelines

⁷⁸ SGACA (Strategic Governance and Corruption Analysis) is a framework for designing strategic responses to wards good governance developed by Clingendael, NL. It aims to capture informal, societal and intangible underlying reasons impacting governance reasons. Instead of transferring institutional models to 3rd countries, it highlights the impact of local factors on the incentives of political actors, and the importance of social and political processes in achieving better governance. We believe that an adapted SGACA for Judicial reform can be an interesting scenario to explore.

Chapter 3

III. JUDICIAL REFORM AND GOOD GOVERNANCE

As presented above, designing and implementing good governance in the newly established Justice Institutions and structures, is crucial in determining the outputs and the long-term impact of the reform. The set up, capacity building and the consolidation of those institutions have been the focus of EU action in Albania assistance since 2016, as well as of other foreign partners. *“EU (has) thus progressively articulated a corpus of substantive and institutional standards of judicial governance. These in turn have been practically enforced through the accession conditionality and using the leverage that the promise of membership entailed”*⁷⁹.

The judicial reform has put to the test the political will of Albania elites and their engagement to make it a success. In certain cases the resulting political fights – as in the case of the diverging interpretation of the Constituting from Parliament and from the President regarding the appointments at the Constitutional Courts – have uncovered the missing trust amongst Albanian state actors. This climate has been further complicated by the complex system of deadlines, the complex and intricate responsibilities, the will of political actors to profit from the situation, and from the high pressure to provide deliverables in very short timelines.

The successful set up and functioning of Judicial system has become part of the conditionality mechanism imposed on Albania in its enlargement path. This section aims to provide a non-exhaustive account on the achievements and challenges faced throughout the implementation of the justice reform, focusing on its outcomes. The data end in July 2020 and cover the advancement of the institutional set up, situation of human resources, the allocated financial resources, and the adoption of internal procedures and of their functioning.

III.1. Institutional set up and human resources

The justice reform has demanded major efforts towards establishing the new institutions, and reorganizing existing ones. Moreover, a substantial number of human resources were needed, either joining the highest levels of the judiciary or judicial governance, or filling the vacancies of all levels in the newly established or existing institutions.

"All justice reform institutions have struggled with the lack of staff and the adequate human resources"

⁷⁹ Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts, by I. Damjanovski, Ch. Hillion and D. Preshova, EUIDEA, Research Papers No. 4, 31 May 2020

All justice reform institutions have struggled with the lack of staff and the adequate human resources.⁸⁰

i. Governance institutions

The HJC and the HPC were established for the first time in December 2018, about 20 months after the legal deadline as stipulated in the amended Constitution,⁸¹ and only after the re-evaluation for the members coming from the judiciary was completed.⁸² The latter has substantially delayed the establishment of the councils. Moreover, there have been significant difficulties in finding eligible candidates that meet the constitutional and legal criteria required to be appointed as members of HJC.⁸³ HJC has benefited from a higher number of employees of the HJC as compared to the former High Council of Justice⁸⁴. The recruitment of new staff has been ongoing since June 2019. However, there are still vacancies to be filled.

"There have been significant difficulties in finding eligible candidates that meet the constitutional and legal criteria required to be appointed as members of HJC"

To fill the vacancies created by dismissals or resignations caused by the vetting process, resignations, or the retirements in the judiciary, the HJC has issued decisions on temporary transfer of judges and on appointment of new judges graduated from the School of Magistrates (SoM). These decisions aimed to speed up the judicial processes and ultimately diminish the adverse impact and substantial delays that dismissals and resignations were causing in delivering justice to citizens. Nevertheless, there are still vacancies to be filled, considered that on average, most of the courts in Albania are running with only 75% of their planned staff capacity.⁸⁵

"A higher number of judges and supporting staff are needed for almost all courts in all levels"

Moreover, a higher number of judges and supporting staff are needed for almost all courts in all levels. Due to the high number of vacancies in the judiciary and following the adoption of the legal package adopted in the framework of the Judicial Reform, the number of openings at the School of Magistrates has been increased by the HJC and HPC. However, the set number of quotas for new potential candidates allowed to join the system as prospective judges and prosecutors were not filled, due to lack of sufficiently qualified

"...lack of sufficiently qualified candidates"

⁸⁰ High Judicial Council Annual Report 2018, pg. 56 www.klgj.al, Albanian Helsinki Committee, Study Report on the Monitoring process of vetting of judges and prosecutors January 2017- June 2018 pg. 31 <https://ahc.org.al/publikime/reports/> and Albanian Helsinki Committee Report on the Establishment and Functioning of new Organs of Justice Government April 2018-March 2019, pg. 40

⁸¹ According to the provisions of the Constitution and Law no. 115/2016 "On governance institutions of the justice system" the HJC should have been established no later than April 2017.

⁸² Based on the Constitutional Provisions, namely article 179 para 5 the Council should have been established no later than 11.04.2017, but effectively it started operating only at 11.12.2018.

⁸³ Albanian Helsinki Committee Report on the Establishment and Functioning of new Organs of Justice Government April 2018 - March 2019, pg. 40 <https://ahc.org.al/wp-content/uploads/2019/08/raport-%e2%80%93-krijimi-dhe-funksonimi-i-organeve-t%3%8b-reja-t%3%8b-qeverisjes-s%3%8b-dreit%3%8b-sis%3%8b.pdf>

⁸⁴ High Judicial Council, Annual Report 2019, pg. 19

⁸⁵ High Judicial Council, Annual Report 2019, pg. 124

candidates.⁸⁶ The number of full time academic staff and external experts of the SoM has also been raised.

HJC was mired in controversy in the case of the appointment of Supreme Court members, resulting in an open conflict with the President of Republic and Supreme Court itself. As to the human resources needed by the SC to cope with the large number of cases, the HJC has entered into a MoU with USAID, aiming at easing the process of dealing with such situation.

The moral hazard: establishment of a backlog reduction structure at the Supreme Court

In May 2020, in order to give a boost to the process of speeding up dealing with the large number of cases at the Supreme Court, and considering the current limited human resources of the latter to cope with such backlog, the HJC signed a memorandum of understanding with the U.S. Agency for International Development (USAID) paving the way for the creation of a body of backlog reduction officers, within the SC. These employees would not be hired by the Supreme Court, but by a privately-managed organization non-resident in Albania. Until August 13th 2020, 12 backlog reduction officers has appointed and will start their work in assisting the Supreme Court to deal with an estimate of 35 000 cases.

However, there are concerns with regard to the scope of work of the backlog reduction officers, mainly with regard to their job description and finally their liability. It is rather unclear whether they would perform only simple inventory tasks, or if they would be involved in a thorough review of cases. If the latter is the case, then their tasks would possibly overlap with those of the legal advisors at the Supreme Court, whose appointment procedure is entirely different and it has to comply with constitutional and legal standards for legal assistants. This may potentially raise issues of rule of law, and accountability in the way in which the SC performs its constitutional duties.

HPC was constituted simultaneously with the HJC, namely more than 20 months from the date of its establishment as provided in the Constitution, and only after the re-evaluation for the members coming from the judiciary was completed. The delays in establishing the HPC are similar to those affecting the HJC. It suffered the same problems with the staffing as HJC: up to December 2019, only 19 out of 32 foreseen members of the staff were recruited⁸⁷.

With regard to filling the vacancies in the prosecution system, since its establishment the HPC has conducted the appointment procedures for the PG and for the prosecutors of the Special Prosecution for Corruption and Organised Crime (SPCOC), following the vetting of the pre-selected candidates. As to the PG, the HPC has concluded the procedure of pre-selecting and ranking the candidates, and it has exercised its constitutional duty to prepare and submit the list of candidates at the Assembly (on 14.11.2019 which resulted with the appointment of the new Prosecutor General⁸⁸). With regard to the SPCOC, the HPC has conducted the procedure of selection and appointment of 11 Special prosecutors,⁸⁹ and of the Head of the SPCOC.

⁸⁶ SoM website <https://www.magjistratura.edu.al/#884> For the academic year 2018-2019 out of 75 quotas approved by the Council, 57 candidates have been accepted.

⁸⁷ High Prosecution Council, Annual Report, pg. 37

⁸⁸ HPC Decision No. 236, dated 14.11.2019 Based on the list, the Assembly has appointed the PG on 05.12.2019

⁸⁹ HPC Press Release, 25.11.2019 <https://klp.al/2019/11/25/keshilli-i-larte-i-prokurorise-emeron-8-prokuroret-e-prokurorise-se-posacme-dhe-shpall-garen-per-kreu-e-saj/>

"The JAC of 2017, and of 2018 were not functional due to dismissals of many of its members as a result of vetting process"

The *Judicial Appointments Council* (JAC) has initiated to exercise its competences only in January 2019.⁹⁰ The JAC of 2017, and of 2018 were not functional due to dismissals of many of its members as a result of vetting process. Regardless the legal requirement facilitating the priority in vetting of the members of JAC,⁹¹ the pace of the process has impacted the establishment of the JAC.

The JAC of 2019, this institution became functional with delay and its composition was accompanied with issues regarding its legitimacy and credibility as its members have not yet undergone vetting.⁹² The HJC did immediately set in motion the process of appointment of the HJI and announced the vacancies for 8 members of the CC.⁹³ In December 5th 2019, the PoR organized the draw for the members of the JAC of 2020, and the new JAC became operational as of January 2020.⁹⁴

"...its composition was accompanied with issues regarding its legitimacy and credibility of this institution, since its members have not yet undergone vetting"

"...scarce number of staff at the Supreme Court able to assist the work of the HJC. At this stage more adequate human resources are needed"

The 2019 JAC Annual Report⁹⁵ raises some issues with regard to the work conditions including missing by-laws or different administrative documents, and lack of support staff. With regard to human resources, due to the high number of vacancies to be filled at once, both at the CC and for the position of the HJI, this institution has encountered various organisational difficulties, including the reliance on the existing scarce number of staff at the Supreme Court able to assist the work of the HJC. At this stage more adequate human resources are needed.⁹⁶

⁹⁰ Assembly, Report of the Independent Monitoring and Coordination Commission for the implementation of Law 115/2016" On the institutions governing the judiciary" <https://www.parlament.al/Files/sKuvendi/kom/Raporti%20i%20Komisionit%20te%20Pavarur%20per%20Koordinimin,%20Monitorimin.pdf>

⁹¹ Law 115/2016 Art. 284 (9)

⁹² Albanian Helsinki Committee Report on the Establishment and Functioning of new Organs of Justice Government April 2018-March 2019, pg. 40 <https://ahc.org.al/wp-content/uploads/2019/08/raport-%e2%80%93-krijimi-dhe-funksionimi-i-organeve-t%20c3%8b-reja-t%20c3%8b-qeverisjes-s%20c3%8b-drejt%20c3%8b-s%20c3%8b.pdf>

⁹³ European Commission Albania Report 2019, pg. 17.

⁹⁴ PoR, Press Release 05.12.2019 <http://president.al/presidenti-meta-perzgjedh-short-nente-anetaret-e-keshillit-te-emerimeve-ne-drejtisi-per-vitin-2020/>

⁹⁵ Keshilli i Emerimeve ne Drejtisi – Raporti Vjetor 2019, at: http://www.gjykataelarte.gov.al/web/raport_vjetor_ked_2359.pdf

⁹⁶ This finding is supported by both the People's Advocate on "Preliminary findings on the functioning the Judicial Appointments Council" <https://www.avokatipopullit.gov.al/sq/articles-layout-1/home/news/this-article-is-available-only-in-albanian-238/> as well as the Albanian Helsinki Committee Report in the Report "Establishment and Functioning of new Organs of justice governance" April 2018-March 2019, pg. 41 <https://ahc.org.al/wp-content/uploads/2019/08/raport-%e2%80%93-krijimi-dhe-funksionimi-i-organeve-t%20c3%8b-reja-t%20c3%8b-qeverisjes-s%20c3%8b-drejt%20c3%8b-s%20c3%8b.pdf>

"...need to increase the transparency of the work of the JAC..."

Also the People's Advocate has highlighted, among others, the need to increase the transparency of the work of the JAC, with regard to publishing the minutes of its meetings, as well as increase overall transparency.

The High Justice Inspector was also appointed with substantial delay, and the structure became functional only in January 2020. In the period January-March 2020 this institution has suffered from initial lack of human resources, an issue which has further persisted due to the situation caused by Covid-19.⁹⁷

"The High Justice Inspector was also appointed with substantial delay, and the structure became functional only in January 2020"

ii. Institutions for the fight against corruption and organised crime

The process of filling the vacancies in the office of Special Prosecution for the Fight Against Corruption and Organised Crime brought its initial results in late 2019. The HPC conducted the procedure of selection and appointment of 11 Special prosecutors,⁹⁸ and of the Head of the SPCOC. Three additional prosecutors have been appointed in May 2020.

The Head of the *National Bureau of Investigation* was recently appointed, following a public process of selection. The NBI is expected to be composed of 60 investigators based on the Decision of the HPC⁹⁹. However, the process of human resource recruitment has not yet initiated.¹⁰⁰

The process of appointment and transferring of members of the Special Courts for Corruption and Organised Crime was initiated in December 2019¹⁰¹. It has been steadily progressing at least until March 2020 when it was affected by the situation caused by Covid-19.¹⁰²

Opposition media¹⁰³ has mentioned two main issues to explain the reluctance of certain prosecutors to apply for those structures. Certain of them think that the vetting is politicised. Hence to protect their career from political influence they prefer not to apply. Another issue is the "extreme limitations" that the law has foreseen for the special prosecutors. Special prosecutors must agree for them and their close family to be permanently under surveillance for 9 years. Moreover their bank accounts and those of their close family are subject of regular control – family members must give their consent for authorities to control their accounts.

⁹⁷ Ministry of Justice, Report, Crosscutting justice strategy monitoring report January- March 2020, pg. 18

⁹⁸ HPC Press Release, 25.11.2019 <https://klp.al/2019/11/25/keshilli-i-larte-i-prokurorise-emeron-8-prokuroret-e-prokurorise-se-posacme-dhe-shpall-garen-per-kreu-e-saj/>

⁹⁹ <https://www.rtsh.al/lajme/byroja-kombetare-e-hetimit-me-60-hetues-klp-se-shpejti-nis-perzgjedhja-aplikoni/>

¹⁰⁰ <https://bkh.al/2020/07/27/njoftim-mbi-perzgjedhjen-e-kandidatit-fitues-per-pozicionin-drejtor-i-byrose-kombetare-te-hetimit/>

¹⁰¹ High Judicial Council, Decision No. 286 dated 18.12.2019

¹⁰² Ministry of Justice, Crosscutting strategy on justice annual report January - March 2020, pg. 9

¹⁰³ "Vacancat ne SPAK / Veting i deformuar e kriteret e forta, ja pse nuk ka aplikime", bodlnews.al, at Feb. 25, 2020

"The institutional set up of vetting has been established with substantial delays"

iii. The vetting institutions

The institutional set up of vetting has suffered substantial delays. Based on the deadline set out in the law, these institutions should have been established by December 2016.¹⁰⁴ Notwithstanding the legal deadline, their members were appointed in June 2017. These delays were due to the suspension of the vetting law by the Constitutional Court, lack of political consensus in the process of appointment of the members by the Assembly, as well as other issues relating to shortage of human resources, including the delays in the appointment of supporting staff.

There has been an acute need for additional staff for vetting institutions since their establishment. Responding to such needs, from 2017 onwards there has been a staff increase of 28% in the Independent Qualifications Commission, of 17% in the Special Appeals Chamber, and a 16% increase in the staff of the Public Commissioner.

"...acute need for additional staff..."

iv. The appointments of the members and other human resources of the Constitutional Court, Supreme Court and Prosecutor General

The justice reform has hugely impacted the functioning of the Constitutional Court. Since 2016 three of its members have resigned (two of them were at the end of their mandate), five have been dismissed by the vetting, and only one has been confirmed in office. As a consequence, the Constitutional Court was deprived of its quorum, with only one judge out of nine remaining in office (and this judge has also reached the end of her term).¹⁰⁵

"The justice reform has greatly impacted the functioning of the Constitutional Court"

"The Constitutional Court was deprived of its quorum, with only one judge out of nine remaining in office"

Moreover, the process of filling the CC vacancies was substantially inhibited by the delays in establishing the JAC. Under these circumstances, the process of appointment started only in 2019. Finally, in September 2019 the JAC was able to compile the lists with the ranking of the qualified candidates for four vacancies, and send the lists to the PoR and the Assembly. The SC was not sent a list due to the loss of its quorum since May 2019, translated in the inability to decide on the new appointments.¹⁰⁶

¹⁰⁴ Law 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" Article 9 and 10

¹⁰⁵ European Commission Albania Report 2019, pg. 15

¹⁰⁶ JAC Decision No.128 dated 21.9.2019 and Decision no 132 dated 21.9.2019. Since 22 may 2019 the Supreme Court lost its quorum due to the dismissal of one of at the time three remaining judges by the SAC through Decision 11/2019 of the SAC.

"The administrative procedure of sending the lists of qualified candidates became a matter of controversy between the President of the Republic and the Judicial Appointment Council (JAC). It resulted in the former pressing criminal charges against the chairman of the JAC, and in the refusal of the President of the Republic to organise the swearing ceremony for one of the judges appointed *ex-lege*"

The administrative procedure of sending the lists of qualified candidates became a matter of controversy between the President of the Republic and the Judicial Appointment Council (JAC). It resulted in the former pressing criminal charges against the chairman of the JAC, and in the refusal of the President of the Republic to organise the swearing ceremony for one of the judges appointed *ex-lege*.¹⁰⁷ The President of the Republic argued that the appointment of Mrs. Vorpsi was a political move organised by the ruling party to capture the functioning of the CC,¹⁰⁸ and was facilitated by the Chairman of the JAC.

The other three appointees were present at the swearing ceremony of the President of the Republic. Meanwhile, one of the earlier appointed members of the Constitutional Court, B. Muci, was dismissed by a decision of the Special Appeals Chamber. As a result the Constitutional Court is still today unable to adjudicate cases in plenary sessions, due to lack of quorum of at least six judges.¹⁰⁹ In these circumstances there is a substantial lack of judicial protection of the fundamental rights of the individuals, as well as a lack of the necessary constitutional checks and balances between constitutional bodies. As to the situation of human resources in the Constitutional Court, from 2017 to 2020 there has been a 15% increase in its staff¹¹⁰.

With regard to the appointment of the Prosecutor General, the HPC has launched the procedure of filling the vacancy for the PG in January 2019. It has published a list with the three qualified candidates in November 2019,¹¹¹ after the qualified candidates had undergone the vetting process. At the parliamentary session of December 5th 2019, the Assembly elected as the new Prosecutor General the candidate who was ranked first in the list of candidates submitted by the HPC¹¹².

Regarding the preparation to the requirements of the upcoming EU negotiating, many of these structures have already appointed officials who are specifically responsible for

"...many of these structures have already appointed officials who are specifically responsible for covering issues within the specific area of Chapter 23"

¹⁰⁷ PoR, Notification, dated 14.11.2019 <http://president.al/njoftim-mbi-organizimin-e-ceremonise-se-betimit-te-gjyqtareve-te-rinj-te-gjykates-kushtetuese/>

¹⁰⁸ PoR, Press statement, dated 15.11.2019 <http://president.al/prononcimi-presidentit-meta-per-mediat/>

¹⁰⁹ Law 8577 dated 10.02.2000 "On the organization and functioning of the Constitutional Court of the Republic of Albania" (amended) Art. 32 para. 1

¹¹⁰ Budget Laws from 2017-2020

¹¹¹ HPC Press Release 14.11.2019 <https://klp.al/2019/11/14/keshilli-i-larte-i-prokurorise-rendit-kandidatet-per-pozicionin-e-prokurorit-te-pergjithshem-sipas-rezultatit-te-procesit-te-pikezimit/>

¹¹² Assembly, Decision No. 138, dated 5.12.2019

covering issues within the specific area of Chapter 23. However, for the majority of the officials the job description does not clearly designate their EU integration related tasks. In some of the institutions, relevant trainings with regard to EU integration issues and the relevant *acquis* chapter has been conducted, but in limited numbers.

III.2. Budget Support and infrastructure

"The Assembly has accommodated the budgetary requests of the majority of Judicial institutions"

In order to ensure independence and impartiality judiciary institutions, the process of approval and of eventual amendments of their requested budget is conducted by the Assembly. The Assembly has accommodated the budgetary requests of the majority of Judicial institutions¹¹³. Nevertheless there is a persisting need for additional funding, especially for the institutions established to fight against corruption and organised crime.

"Nevertheless there is a persisting need for additional funding, especially for the institutions established to fight against corruption and organised crime"

Going through Annual Budget Laws, from 2017 onwards there has been a noticeable increase in the total budget of the

"...a noticeable increase in the total budget of the judiciary..."

judiciary¹¹⁴ with Prosecution showing a very high spike in funding. With regard to the budget of the Constitutional Court, while there was a substantial increase in 2019, its 2020 budget was reduced by 9% compared to the previous year. There has been a slight increase in the budget of the vetting institutions, including the Independent Qualifications Commission and the office of Public Commissioner, whereas the budget of the Special Appeals Chamber has decreased by 9%.

As to the Prosecution, the budget allocated for 2019, was in line with the requested amounts¹¹⁵. With regard to the Special Court, a specific fund has been granted to the Special Courts for Corruption and Organised crime for the purpose of infrastructure development.¹¹⁶

With regard to the judiciary, the budget allocated in 2019 was 75% of the budget requested¹¹⁷. Nevertheless, it should be mentioned that the 2019 allocated budget was 21% higher than that of the previous year.¹¹⁸

According to the Minister of Justice, the budget allocated to cover the overall needs of the justice reform in 2020 is 11% higher than the previous year, and 25% higher compared to year 2018¹¹⁹.

¹¹³ Interview with SAC representatives, date 29.01.2020

¹¹⁴ Budget Law 2017, 2018, 2019, 2020

¹¹⁵ Prosecutor General, Annual Report 2019, pg. 344

¹¹⁶ Ministry of Justice, Crosscutting Justice Strategy Annual Report, pg. 68

¹¹⁷ High Judicial Council, Annual Report 2019, pg. 156

¹¹⁸ High Judicial Council, Annual Report 2019, pg. 156

¹¹⁹ Albanian Telegraphic Agency, Buxheti 2020/ Justice Reform in focus, 371 milion Lek allocated to SPAK, 20.11.2019 <https://ata.gov.al/2019/11/20/buxheti-2020-reforma-ne-drejtisi-ne-fokus-371-milione-leke-per-spak/>

Due to the abandonment of the Parliament from the opposition there has been no significant supervisory role of the parliamentary commissions during the assessment and approval of Judicial budgetary lines.

Despite the increase in budget support for newly created justice institutions, the budgetary concerns remain of actuality. Those concerns and their impact on High Prosecution Council and on Special Prosecution were raised by the head of HPC early 2020.¹²⁰

"...there is neither any assessment nor any reference in any of the budgets of these institution with regard their needs during Enlargement negotiations in the framework of Chapter 23"

Bearing in mind the role of these institutions, and the outputs they produce in the negotiating phase with the EU, there is neither any assessment nor any reference in any of the budgets of these institution with regard their needs during Enlargement negotiations in the framework of Chapter 23.¹²¹ Other sources of support, such as donor support have been mainly allocated with regard to *ad hoc* staff training.

Regarding the infrastructure premises, for the HJC, the HPC and the SoM, as of July 22, 2019 these institutions have been lodged at the "Pole of Justice" building.¹²² The premises of the SPCOC and the SCCOC shall be used to host the Serious Crime Prosecution and the Serious Crime Courts.

The High Justice Inspector was granted premises only in the early months of 2020. Moreover, the budget allocated to capital investments, including the improvement of infrastructure of courts, including IT infrastructure is qualified as not sufficient.¹²³

Lastly, it should be noted that following the budgetary constraints caused by the situation of emergency declared in some regions, due to the earthquake of November 2019¹²⁴, signing procurement contracts with public funding has been suspended. This has impacted the contracting plan and the spending pace in some institutions of the judiciary.¹²⁵

More importantly, the Covid-19 situation has impacted the budget amounts allocated to the justice institutions, due to the need to revise the state annual budget in order to cope with urgent needs to address the pandemic situation. For instance, the HJC in April 2020 required funds to the Ministry of Finance and Economy from the judicial budget

"Covid-19 situation has impacted the budget amounts allocated to the justice institutions, due to the need to revise the state annual budget in order to cope with urgent needs to address the pandemic situation needs to address the pandemic situation."

¹²⁰ <https://klp.al/2020/01/21/kryetari-i-klp-se-gent-ibrahimi-ne-konferencen-rajonale-hetimi-financiar-i-korrupsionit-ne-shqiperi-maqedonine-e-veriut-dhe-kosove/>

¹²¹ HJC, HPC, SoM

¹²² CoM Decision No. 234 dated 17.04.2019 "For the integrated program of developing the justice pole"

¹²³ High Judicial Council, Annual Report 2019, pg. 161

¹²⁴ based on the Council of Ministers Decision 750 dated 27.11.2019 "For declaring the state of natural calamity in Durrës dhe Tiranë"

¹²⁵ For illustration purpose refer to the High Prosecution Council, Annual Report 2019, pg. 40

for the purpose of coping with the situation created by Covid-19.¹²⁶

III.3. Standard Operating Procedures

Progressively the newly established institutions in the framework of the Justice Reform – including all the vetting structures - are adopting their internal regulation procedures¹²⁷. The adopted standard operation procedures already in force are accessible to the public through respective websites.¹²⁸

Other institutions are in the process of adopting them, including the HJC and HPC. This means that many of them have functioned for more than one year without adopting the complete set of internal Rules of Procedure¹²⁹. For instance, the High Prosecution Council has adopted eight internal regulations since its establishment. However, the internal regulation detailing the communication and internal procedures is not yet adopted.¹³⁰

With regard to those institutions who already have internal procedures in place, the latter do not refer to the specific tasks that need to be carried out in the framework of their engagement towards EU integration issues.

¹²⁶ High Judicial Council Decision No. 138 dated 16.04.2020

¹²⁷ IQC Internal Regulation <http://kpk.al/rregullore-per-veprimatine-e-komisionit-te-kualifikimit-kp/>, SAC <http://kpa.al/legjislatoni/> JAC http://www.gjykataelarte.gov.al/web/Akte_normative_te_K_E_D_5594_1.php, for the GP- http://www.pp.gov.al/web/Rregullore_50_1.php and SAC Regulation <http://www.kpa.al/wp-content/uploads/2018/04/Rregullorja-KPA.pdf>

¹²⁸ For instance, refer to the Regulation of the Functioning of the Independent Qualifications Commission, <https://kpk.al/wp-content/uploads/2017/11/Rregullore-per-veprimtarine-e-Komisi-onit-te%CC%88-Pavarur-te%CC%88-Kualifikimit-perfundimtare-miratuar.docx.pdf>

¹²⁹ HJC and HPC Annual Reports 2019

¹³⁰ High Prosecution Council, Annual Report, 2019, pg. 59

Conclusions

The justice reform in Albania demonstrate the complexities of associating the progress of a country towards meeting EU conditionality with the painful and long process of undergoing deep reforms, and of showing swift tangible outcomes. Such endeavor has resulted far from easy for various reasons often ending in a Catch22 situation where the Enlargement progress is conditioned by the impact of reforms, while the Reforms cannot progress without the support of the mechanisms provided by the Enlargement.

We have assessed the role and impact of political will and of good governance in the progress of Albania towards EU membership. The political will needed to bring forward change through the reform has a systemic importance. Inducing and implementing systemic changes when predatory elites are still in charge requires a broad basis of participation for it to succeed. It is highly unrealistic for those multifaceted tectonic changes to happen in a short interval of time, to be quantifiable in minute detail, and to be implemented with non-political instruments. The main setbacks of the current reforms reside in entrusting various implausible principals as main actors to change the regime. Their political will has not been properly accounted for.

While intergovernmental partnerships is the way EU works to support good governance, to be successful in such endeavors, the main local partners of EU should include broad national coalitions. If they do not exist the main contribution of the international community is to identify them, and then support them in becoming both broad and powerful.

The main part of reform monitoring and reporting should be entrusted to those actors outside from the captured institutions. The institutional reform programs should be designed with this political approach in mind. In the case of EU instruments, political dialogue should also act in concert with the assistance and conditionality, promoting representative local pro-reform actors and avoiding the 'professionalization' of reforms by limitation to a circle of 'experts'.

From the good governance perspective, four years after the adoption of the Justice Reform allow to identify and assess different issues impacting the good governance components. All by acknowledging its undeniable achievements, with the hindsight it appears that the main hurdles faced by the justice reform in Albania are rooted in the design phase, accompanied with the need to show swift results demanded by the EU integration agenda. The short time allocated to complete dramatic changes (including amending 1/3rd of the Constitution), the socio-cultural context, the oversized role of current political elites in the design and implementation, the overriding of good governance promotion by other strategic priorities, insufficient involvement of the citizen and an overestimation of the country's abilities to produce new qualified members of the judiciary willing to become part of the new institutions, are some of the original sin.

While establishing the initial institutional set up, recruiting the human resources, and acquiring budget support, the outcomes of the Justice reform were affected by institutional deadlocks, substantial delays in the appointment process, and other obstacles caused by the lack of available resources. A small pool of qualified candidates, institutional conflicts amongst main political actors, accusations of "capture" of the justice system, lack of adequate infrastructure, and a combination of the above slowed down the work of the new structures. It became increasingly obvious that the majority of these implementation problems were not anticipated during the planning phase of the reform and neither respective mitigation scenarios were foreseen. Two emergency situations - the Earthquake of November 2019 and the situation caused by Covid-19 – complicated them further.

One of the major struggles during the implementation was the filling of the vacancies in the newly created and existing institutions. This need was greatly affected by both the lack of qualified candidate and by the increase in the dismissals and resignations caused by the vetting.

During implementation and despite the increase in the budget allocated to justice institutions, there have been various cases of decline in financial support towards specific structures. Moreover, there's still a pressing need to properly fund the institutions conducting investigation and prosecution of corruption and of organised crime.

With regard to the internal procedures, except the vetting institutions, other institutions governing the judiciary fall behind in matters of their drafting and adoption.

When assessing the various aspects of good governance, it should be noted that they are interrelated with each other. For instance, the lack of infrastructure affects the ability to increase the human resources. Whereas the lack of standard operating procedures might affect the way in which the allocated budget is effectively implemented, or how efficiently the existing staff delivers their outputs. Moreover, other external factors, such as the emergency situation related with the earthquake in late 2019, and the Covid-19 situation have impacted the functioning of these institutions and have substantially influenced their capital investment pace, as well as reducing their budget.

Through the weight given to the Fundamentals chapter, the EU finally brings to the fore of its relations with SEE6 the democratic legitimacy of the institutional framework and ensures the sustainability and efficiency of its functioning. This development provides a much-needed contribution for the SEE6 countries to muster the political will of their citizen for the exercise of their democratic rights and obligations, and ensure the good governance of their democratic institutions. Enlargement is the main reform engine in SEE6.

Notwithstanding its imperfections, the Justice reform in Albania constitutes a huge advancement in the establishment of functional democracy in a post-communist country. Being the first reform of such depth and scope, it represents a test case for exposing the systemic importance of the design phase, the need to embed any system change on the socio-cultural and economic base of local society, the importance of planning carefully the required resources, and the value of well selecting the partners. The success of such an endeavor will also test the working hypothesis of irreversibility of democratic reforms, as well as the suitability of EU instruments supporting those reforms.

Annex 1

List of institutions and structures interviewed

No.	Institutions interviewed
1	The Assembly
2	Ministry of Justice
3	Ministry of Europe and Foreign Affairs
4	Ministry of Interior
5	Ombudsman
6	High Judicial Council
7	High Prosecutorial Council
10	High Inspectorate for the Control and Declaration of Assets and Conflict of Interests
11	General Directorate for the Prevention of Money Laundering
12	Judicial Appointments Council
13	Independent Qualifications Commission
14	Special Appeals Chamber
15	Attorney General's Office



EU ENLARGEMENT AND COUNTRY REFORMS - THE JUSTICE REFORM IN ALBANIA AS A CASE STUDY

This policy study was developed in the framework of the project “Preparing and Supporting Albania for the EU Accession Process – ALBE”, implemented by Cooperation and Development Institute (CDI). This project is supported by the Dutch Embassy in Tirana.

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Tirana, August 2020

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