

SECURING THE RESILIENCE OF JUSTICE SECTOR REFORM IN ALBANIA

Authors:

Steven Blockmans

Ardian Hackaj



Policy Study
March 2021



SECURING THE RESILIENCE OF JUSTICE SECTOR REFORM IN ALBANIA

by

Steven Blockmans

Ardian Hackaj

SECURING THE RESILIENCE OF JUSTICE SECTOR REFORM IN ALBANIA

This policy study was prepared by Mr. Steven Blockmans, Director of Research, Centre for European Policy Studies (CEPS), Brussels and Mr. Ardian Hackaj, Director of Research, Cooperation and Development Institute (CDI), Tirana. The authors would like to thank Fjoralba Caka for her insightful suggestions.

Keywords: *Justice Reform, Resilience, Albania*

© Copyright 2021, Cooperation and Development Institute.

All rights reserved. Tirana, March 2021



Cooperation and Development Institute

"Milto Tutulani" Street, Building No.6, Entry 8, 3 & 4, 1019, Tirana Albania

E-mail: info@cdinstitute.eu

Website: www.cdinstitute.eu

This policy study is prepared 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.

Disclaimer: The opinions expressed in this Policy Study may include a transformative remix of publicly available materials as provided by applicable laws. The opinions, conclusions and recommendations by the authors are their own, and do not reflect the views of Dutch Embassy in Tirana or of any other party.

Table of Contents

Abstract	5
Background.....	6
I. Changing the approach: How to monitor the reforms	7
II. Throughput legitimacy: The key to building resilient institutions	11
III. Constructive criticism gleaned from the inquiry.....	13
III.1. Vision, values and political will.....	14
III.2. Key competences, basic infrastructure, internal Rules of Procedure, technical and financial resources.....	15
III.3. Sustainability, transparency, learning processes and the strength of partners.....	17
Conclusions.....	19
LIST OF ANNEXES	22
ANNEX 1. Guiding questions for semi-structured interviews.....	22
ANNEX 2. Interviews	23

LIST OF ACRONYMS

CC	Constitutional Court
CoM	Council of Ministers
EC	European Commission
ECHR	European Court of Human Rights
EUD	European Union Delegation
EURALIUS	Consolidation of the Justice System in Albania
HIJ	High Inspector of Justice
HJC	High Council of Justice
HJC	High Judicial Council
HPC	High Prosecutorial Council
ICITAP	International Criminal Investigative Training Assistance Program
IPA	Instrument of Pre-Accession
JAC	Justice Appointment Council
MoJ	Ministry of Justice
NBI	National Bureau of Investigation
NEM	New Enlargement Methodology
OPDAT	Office of Overseas Prosecutorial Development, Assistance and Training
PAMECA	Consolidation of the Law Enforcement Capacities in Albania
SEE6	Six South-East European countries
SPOACOC	Special Prosecutor's Office Against Corruption and Organised Crime
USAID	United States Agency for International Development

Abstract

Once set up or reformed, the Justice institutions of the six South-East European countries (SEE6) must function efficiently and produce qualitative and effective outputs without permanent external assistance. To be sustainable, new structures must be well governed. To be resilient, they should plan for the long term, taking into account the availability of local resources, and carrying out regular risk-management exercises. Good governance features of effectiveness, efficiency, transparency, accountability, predictability, sound financial management and integrity compliance should characterise the new Justice institutions.

In the case of justice reform in Albania, good governance of new institutions implies designing organisational structures that are fit for purpose, and attributing the appropriate budgets, logistics and systems needed for the effective fulfilment of their mandates. It involves making sure that responsibilities and tasks are clearly assigned and that staff are motivated and have the competences required to carry out their duties with the highest degree of integrity and professionalism.

By applying an 'appreciative inquiry' approach, this policy study identifies and assesses features of Albania's new structures and institutions that belong to the positive core of justice sector reform: vision, values, key competences, basic infrastructure, embedded knowledge, learning processes, organisational achievements, technical and financial assets and resources, positive macro trends, and strength of partners. In a constructive, yet critical way, this report aspires to embolden those (f)actors that drive justice sector reform in the SEE6 forward.

Background

For almost a decade now, EU membership aspirations of candidate countries have been conditioned on the progress of justice sector reform. To underline the importance of such reform for Enlargement, to operationalise its monitoring and to strengthen the credibility of the pre-accession process, the European Commission put the emphasis on securing ‘fundamentals first’. In 2012, it presented a new approach to the rule of law, which focusses on EU accession negotiation Chapter 23 – Judiciary and Fundamental Rights, and Chapter 24 – Justice, Freedom and Security. In 2020, it put these into a cluster called ‘Fundamentals’.

Gradually, the insistence on these fundamentals has been frontloaded, to the point where measurable progress on judicial reform and the fight against corruption and organised crime became explicit conditions to open accession talks. In Albania’s case, while the reforms had been advancing since October 2014, the June 2018 Council conclusions transformed them into an integral part of the conditions put forward by EU for the official opening of accession negotiations. At the same time they were refined as the new conditions focussed on measurable impact; and the scope of existing conditions was enlarged to include ‘fundamentals’ such as respect for democratic principles, human rights and the rule of law.¹

Those new additions were almost exclusively the result of requests coming from Member States. The 2020 enlargement strategy confirmed this shift with the role that it foresees for Member States in on-site monitoring, reporting and providing assistance in selected sectors. This development has been at the centre of European Council discussions regarding the opening of negotiations with Albania and North Macedonia.

As a result, the pre-accession instruments of political dialogue, conditionality and assistance have been geared toward making a success of the justice sector reform, so as to open the way for speedier convergence in other areas, i.e., strengthening of democratic institutions, public administration reform and economic governance. **But it is the slow pace of judicial reform that has affected progress in those other areas, as well as the EU’s enlargement process writ large, resulting in a Catch22 situation:** the pre-accession incentives needed to complete justice sector reform are held back because of the slow progress made on judicial reform.² As a result, the official opening of accession negotiations is pushed back. The question is how to break this downward spiral, and which lessons to draw for similar cases.

The breadth and depth of justice sector reform in Albania represents a unique case to understand, assess and adapt the systemic importance of EU membership-driven reform processes in the SEE6. The choice of the design, the need for societal involvement and support for system change, the importance of comprehensive and long-term planning alongside the availability of resources, and the value of selecting reform partners to carry out such changes all condition the overall success of such a transition in line with EU values and standards.

¹ Frontloading Conditionality: The EU Council Track Record Table for Albania, at: <https://cdinstitute.eu/2020/04/21/frontloading-conditionality-the-eu-council-track-record-table-for-albania/>

² The Commission’s regular report of October 2020 notes that 35% of the EUR 98 million available for the implementation of the justice strategy is derived from international donors, in particular the EU.

I. Changing the approach: How to monitor the reforms

Research conducted in the framework of the ALBE³ initiative categorised the initial problems encountered in Albania's judicial reform process as follows:

First, the **political will** of local political elites was not sufficiently taken into account in the overall design of the judicial reform process. Most of the blockages in the set-up phase of new institutions and structures were derived from political bickering. Only when it became apparent that international partners would not allow any deviation from the set course, did the Albanian political elites rally behind the reform (as illustrated by the 140 to 0 vote on Constitutional amendments allowing for justice reform to proceed).

Second, no worst-case scenarios, no mitigation measures and no plans B or C were foreseen. Hence, many **ad-hoc solutions and compromises** were adopted to overcome the blockages during the institutional set up phase, thus affecting the longer-term resilience of the whole system.

Third, the initial design of the reform, its overall architecture and subsequent resources were based on seven pillars: reassessment of the functioning of the Constitutional Court; judicial power; reassessment of civil and criminal law; the creation of anti-corruption structures; reassessment of legal education and training; financial arrangements for justice sector reform; and independent legal professions. Yet, once underway, the **focus of the reforms shifted** almost exclusively to the vetting process. When the vetting started delivering its results in 2018, many justice officials either resigned or were dismissed (mainly over unjustified owned assets). As a result due to, *inter alia*, delays in the re-evaluation proceedings and the lack of qualified candidates the country was left without fully functioning institutions (a situation which, for the Constitutional Court and High Court, persisted until well into 2020). Moreover many of the suggested replacement candidates were strongly contested by the opposition as well as by representatives of civil society, thus affecting the democratic legitimacy of the new structures.

Fourth, the ten-month delay in parliament to raise the necessary budget for the new structures was carried over into the overall functioning cycle of the newly established bodies. The 'consequential triggering mechanism' (which requires the total and perfect closure of one step to advance to the next), which was designed to guarantee the 'purity of new institutions', **delayed** the whole set-up phase.

Fifth, the overwhelming focus on the vetting phase, the delays in setting up the new structures and institutions, the continuous political interference and huge public-opinion expectations to 'catch the big fish' distracted attention and resources from the operation phase. Once the legal set-up phase ended, the new justice structures faced technical and administrative hurdles to tap into the necessary financial and human resources to start functioning, incomplete **rules of procedure**, as well as an over-reliance on external

³ ALBE is an initiative implemented by CDI and supported by Dutch Embassy in Tirana that focusses on the inter-connectedness between enlargement and reforms. Previous research includes: (i) [EU Enlargement in SEE6 and Country Reforms: The Justice Reform in Albania as a Case Study](#); (ii) [Frontloading Conditionality: The EU Council Track Record Table for Albania](#); and (iii) [EU Candidate Country Reforms and the New Enlargement Methodology: Searching For a Roadmap](#).

assistance. This affected their efficiency and, if not corrected, in the long term may impact their sustainability.⁴

These initial challenges faced in Albania's judicial reform process⁵ had a direct negative impact on the pre-accession dynamics of the country. The EU compliance control of the 'fundamentals' duly reflected the shift from the Commission's box-ticking exercise focussed on the establishment of new institutions, to the Member States' insistence on the democratic legitimacy of the new structures.⁶ So while the Commission reported on the successes of the institutional set-up phase, Member States in the (European) Council denounced the political manoeuvrings of Albania's political parties accused of trying to control the set-up of the new justice reform institutions.

This bifocal attention paid to legal establishment of new structures and the democratic legitimacy of new justice sector institutions was eventually reflected in the New Enlargement Methodology (NEM) of 2020 and the subsequent European Council decision on the opening of negotiations with Albania. The focus on fundamentals and the increased role of the Member States in monitoring reforms on the ground, in the preparation of regular country reports, and in the provision of assistance in selected sectors⁷ is now an official part of the NEM.

Yet, the NEM contains neither benchmarks nor a comprehensive methodology that unifies the monitoring of democratic legitimacy of the SEE6 institutions with the control of their deliverables. The strategy is based on a problem-solving approach. As such its successful implementation depends on a thorough understanding of the root causes of the challenges faced by the SEE6, identifying the right way to deal with them, assembling the necessary allies on the ground, and employing the instruments and resources to make sure that the solution is sustainable and the new institutions are resilient. The roadmap for the rule of law chapters, equivalent to the previous action plans, will have to address the need for realistic

⁴ A comprehensive overview of the reasons causing delays in the set-up and initial phase of operation of the new justice institutions is presented in "Study Report on Monitoring of the Vetting Process for Judges and Prosecutors for the Period Jan 2017 – June 2018", by E. Skendaj, F. Caka and M. Bodgani, AHC eds. 2019, at: <http://www.ahc.org.al/wp-content/uploads/2018/11/Study-report-on-monitoring-of-the-vetting-process-for-Judges-and-prosecutors-for-the-period-of-Jan17-Jun18.pdf>

⁵ For a comprehensive view of main challenges that freshly established justice institutions faced, see: "EU Enlargement in SEE6 and Country Reform: The Justice Reform in Albania as a Case Study", by A. Hackaj, CDI 2020, at: <https://cdinstitute.eu/wp-content/uploads/2020/09/EU-Enlargement-in-Balkans-and-Justice-Reform-in-Albania-1.pdf>

⁶ The complaints of Member States were more about the capture of new democratic institutions, their representativeness or their accountability than about their deliverables. In concrete terms, while the Commission was OK-ing the deliverables of the reformed institutional framework, Member States were questioning their democratic legitimacy, as translated by Bundestag conditions. For an analysis of the shift of Member State conditionality towards democratic legitimacy and rule of law, see: <https://cdinstitute.eu/wp-content/uploads/2020/04/FRONTLOADING-CONDITIONALITY-THE-EU-COUNCIL-TRACK-RECORD-TABLE-FOR-ALBANIA.pdf>

⁷ The NEM also made obligatory a roadmap for the Chapter on rule of law and on institutions, a scope dramatically larger than the ongoing public administration reform. By deciding that the cluster of 'fundamentals' be opened first and closed last, the Commission underlined the systemic importance that democratic legitimacy of SEE6 institutions has for the EU.

and efficient monitoring of progress of reform deliverables and of the democratic legitimacy of the SEE6 institutions.

Disconnected as it is from the historical, cultural and socio-economic foundations of individual SEE6 countries, the NEM does not properly identify short- and longer-term local needs, resources and limiting (f)actors. It also insufficiently valorises the 'leveraging of local structures' core strengths'. And perhaps most interestingly, the strategy simply assumes the unwavering commitment of current SEE6 political elites to European values and to full EU membership as an unchangeable constant.

Seen from this perspective, we consider it of high added value to use Albania's experience in justice sector reform to build a coherent body of knowledge that will help to better plan, implement, monitor and maintain a sustainable institutional reform dynamic in the SEE6.

We estimate that identifying success (f)actors and using the core strengths of reform structures such as local context and examples of good governance can improve the efficiency and effectiveness of domestic reform processes, and the overall resilience of new institutions. Moreover, lessons learned can eventually be uploaded to the EU's overall enlargement policy.

While not discarding completely the 'problem-solving approach' of the NEM, we believe that an 'appreciative inquiry' approach can be used to identify and assess features of the new structures and institutions that belong to the core strengths of justice sector reform. After all, the ulterior aim of this policy study is to tease out lessons on how to maximise success (f)actors that render resilient the good governance mechanisms in the justice sector. As explained in section 2 of this report, the emphasis is on 'throughput legitimacy'.

In contrast, exclusively adopting a problem-solving approach would mean isolating the justice reform from a country's socio-economic context, prioritising the production of short-term results without taking much account of the permissiveness of the local context, the origin, amount and long-term availability of mobilised resources, the availability of local inputs, the governance features of the reform process, the sustainability of results and the resilience of newly established institutions.

Our analysis is primarily based on an adaptation of the research method developed by David Cooperrider, Professor of Social Entrepreneurship at Case Western University.⁸ His methodology of change management focuses on leveraging an organisation's 'positive core' strengths to design and redesign the systems within an organisation to achieve a more effective and sustainable future.

Rather than relying on public perception, our 'appreciative inquiry' into the sustainability of Albania's justice sector reforms was therefore based on a series of semi-structured interviews, and a workshop with key stakeholders conducted in late 2020. By asking questions about the main results and achievements of aligning the Albanian justice system to European standards (see Annex 1), affirmative choices and success (f)actors can be identified for the past, present and future of the judicial reform process. The main findings are presented in the third section of this report.

The paper will conclude with a tentative description of the (f)actors that condition the

⁸ See, e.g., David Cooperrider, Diane Whitney and Jacqueline Stavros (2008), *The Appreciate Inquiry Handbook: For Leaders of Change* (2nd ed.). Brunswick: Crown Custom Publishing.

resilience of newly created justice institutions and structures, and of the ways that the EU can contribute to support them in a sustainable fashion. Further research could focus on the question how these recommendations could be replicated elsewhere and/or be uploaded in the enlargement methodology and application of the EU's funding instruments.

II. Throughput legitimacy: The key to building resilient institutions

Following the work of Vivien Schmidt, Jean Monnet Professor at Boston University, the study of 'throughput legitimacy' concentrates on what goes on inside the 'black box' of governance, in the space between the political input and the policy output.⁹ Core features of governance structures and processes include, *inter alia*, effectiveness, efficiency, transparency, accountability, predictability, sound financial management, fighting corruption, etc.¹⁰ It is those features of throughput legitimacy that we will use in our appreciative inquiry into Albania's justice sector reform.

Throughput legitimacy brings the sustainability of institutional reforms into focus. This is important because of the long timeframes of reform processes and the specificities for absorption by the domestic context. As such, our analysis touches on:

- The prevention of institutional entropy, i.e., if cost of input resources is higher than the cost (or financial value) of deliverables;
- Whether crucial inputs such as financial and human resources are available and accessible during the whole duration;
- A (mis)alignment of the local value system to the chosen institutional architecture (mostly conditioned by particularism vs. universalism);
- The overall benefit for the citizen when policymakers shift the available resources and political capital away from health, social or education towards justice sector reform (or the Pareto improvement concept¹¹); and
- The amount of any eventual collateral damage done during the reform process (such as institutional blockage).

Throughput quality directly impacts institutional resilience, i.e., the capacity of governance structures to withstand shocks induced by, *inter alia*, corruption and incompetence. Bad throughput – consisting of oppressive, incompetent, corrupt or biased governance practices – regularly undermines public perceptions of the legitimacy of institutions' governance, regardless of the degree of input legitimacy or the effectiveness of their output. Insufficient or bad throughput more than often de-legitimizes both inputs and outputs.

To learn about the throughput quality of their governance mechanisms as identified by their efficacy, accountability, transparency, inclusiveness and openness to interest intermediation, the interviews with office holders of new justice reform institutions (see Annex 2), covered the following components:

- *Human and technical resources*, including office space, number and skill proficiency of support staff; availability of IT systems, manuals, etc.
- *Budget support and logistics* for the institutional set-up;

⁹ Vivien A. Schmidt (2013), "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput", *Political Studies*, Vol. 61, 2–22.

¹⁰ See also Tanja A. Boerzel et al. (2008), "Good Governance in the European Union", Berlin Working Paper on European Integration No. 7, Freie Universitaet Berlin.

¹¹ A situation is called 'Pareto improvement' when after an induced change some agents win and no agent loses.

- *Standard operating procedures*, i.e., state of affairs of their design, adoption and implementation inside the new structure and institutions, as well as clear and efficient inter-institutional communication and coordination procedures between structures involved.

The goal was to have a summary view on the administrative capacity built up during the reform process. We then organised a roundtable discussion with key interlocutors to validate our initial findings (*see Annex 3*).

III. Constructive criticism gleaned from the inquiry

The problem solving approach was adopted during the planning phase of Justice reform to deal with the phenomena of institutions' capture and incompetence. This approach helped to deal with the democratic deficit of new justice institutions, or their input legitimacy.

Albanian judges, lawyers, academics and even high-ranking politicians have accepted that one of the unintended results of the justice sector reform was the paralysis of the country's highest courts for roughly two years.¹² That paralysis opened the door for new forms of legal abuse and corruption.¹³

Indeed, many criticisms that inform such judgments were shared with us during the interviews and workshop: the lack of precision in some of the reform laws; the lack of an inception period; the delays incurred to start the reform due to lax attitudes by both the government and parliament to make the necessary financial and infrastructural resources available; alleged political interference in the appointment of candidates for vetting structures and in the new justice institutions; the insufficiency of the pool of recruits who could fill the spaces left by those who resigned or were sacked in the context of the vetting process; etc.

The above findings are well documented, and result from a problem-solving approach applied to the identification of main blockage points and challenges affecting the justice sector reform process. Its criticisms are mainly focused on the problems met during the phase of design and set-up of new justice structures.

Once set up, the new justice institutions and structures faced a new set of challenges related to their functioning. Availability of qualified staff, logistic resources, existence of operating procedures, and financial support were among the very first issues new occupants had to deal with, before proceeding with the prosecution of corruption or trial procedures. Efficacy, accountability, transparency and inclusiveness became the real benchmarks of these new organisations. Their survival depended on the legitimacy of their governance and their success in overcoming these multiple throughput challenges.

During the first year of operations of new Justice institutions we identified good practices that were not initially planned, but were implemented by the newly appointed office holders to overcome their daily challenges. In that context the valorisation of endogenous resources and practices is crucial to assure the sustainability and resilience of newly set structures, once the support and protection of foreign partners has ended.

Our 'appreciative inquiry' approach is geared toward identifying and assessing features of the new structures and institutions that belong to the 'positive core' strengths of the reform. We will try to understand what worked in their first year of functioning, how they dealt with

¹² See, e.g., Endri Myckaj (2020), "Judicial Vetting: A Key Policy Tool to Fight Corruption in Albania", U4 Anti-Corruption Resource Centre, 11 November.

¹³ See, e.g., Gjergji Vurmo (2020), "Tailor-made Laws in the Western Balkans: State Capture in Disguise", *CEPS Policy Insight*, No. 12, 11 May.

the problems they faced, what is their vision of the future and what would be their next steps. These features are clustered as follows: (i) vision, values and political will; (ii) key competences, basic infrastructure, embedded knowledge, technical and financial resources; and (iii) sustainability, learning processes and the strength of partners.

III.1. Vision, values and political will

Vision, values and political will are the *sine qua non* preconditions for any reform process to materialise. In the case of Albania they came from a combination of internal and external actors. The pull factor of EU membership and the push factor of the international community (mainly EU delegation and US embassy in Tirana) catalysed and channelled Albanian political and societal forces, to support and engage in an ambitious justice sector reform.

A clear strategic vision, grounded in Albania's amended constitution and European values, guided the process. Responding to the frustrations of Albanian citizens, the reform capitalised on their expectancies of fighting corruption, increasing their access to justice, ensuring the separation of powers and the independence and impartiality of the judiciary, promoting professionalism, and increasing overall efficiency and accountability of the judiciary. The reform was presented as an absolutely necessary first step to get closer to full EU membership, and to demonstrate Albania's belonging to a European community of values. As such, the highly scrutinised 2016 Parliamentary vote of 140 to 0 in favour of judicial reform generated a historical paradigm shift for Albania. The crucial role played by unreserved support from US and EU allies is perfectly illustrated by the proverb 'where there is a will, there is a way'.

The role of political will of local elites (or its absence) appears in the establishment and functioning of the Justice Appointment Council (JAC)¹⁴. The initial chaos (no by-laws, no detailed administrative procedures regarding the recruitment of Constitutional Court members, no support staff and no adequate office space)¹⁵ was compounded by the heavy intervention of politics. Such 'negative political will' added to the planners inability to properly account for local restrictive factors made visible two defects: (i) the planning of the creation of the JAC was not optimal as it did not address the eventuality of 'capture' phenomena; (ii) its throughput legitimacy was not addressed either, as evidenced by lacunas in its functioning.

However after a tumultuous start, many pieces of the puzzle fell into place. Among the most relevant achievements the following can be mentioned:

- The High Judicial Council (HJC) has for the first time adopted a strategic action plan and in one year has reached fulfilment of 70% of the planned measures. The Council managed to have regular and periodic meetings, despite COVID-19 restrictions. The HJC has been focussing also on 'establishing a culture of justice, good judgment and

¹⁴ A temporary Justice Appointment Council was foreseen in case it was impossible to set up the 'real' JAC in time. However due to missing political will and the failure to vet many candidates, the temporary JAC did not start functioning properly until 2018.

¹⁵ JAC Annual Report 2019.

organisation as a duty of new justice institutions’ and on establishing trust with the public.

- Despite the limitations and restrictions faced by the High Prosecutorial Council (HPC) after a two-year delay in its creation, the Council has shown leadership (cf. >500 decisions taken since its establishment) and resilience in improving working processes. Best practices include the prioritisation of impactful decisions (cf. election of the General Public Prosecutor); taking initiative (cf. start of investigation against disciplinary measures for prosecutors, despite the High Justice Inspector not having been established); and good inter-institutional coordination with, e.g., the HJC, the Special Court and the Special Prosecutor’s Office Against Corruption and Organised Crime (SPOACOC).
- Although SPOACOC was under high pressure to urgently deliver on its investigations of organized crime and corruption and communicate them with the public while drafting and adopting its own functioning rules, it has gradually moved towards a more strategic approach. The standards, internal processes and key performance indicators are being designed with the objective of efficiency and sustainability.

III.2. Key competences, basic infrastructure, internal Rules of Procedure, technical and financial resources

The freshly created justice reform institutions hit the ground running. Despite the absence of an inception period, design flaws were addressed in the first year of their functioning; gaps in the new laws were plugged; relevant by-laws were adopted; and internal rules of procedure for the new institutions were drafted after their creation. ‘It was like fixing up a car while driving.’¹⁶

Top-down implementation proved effective yet revealed the need for pre-emptive accompanying bottom-up actions, for instance in the education of lawyers and the recruitment of new judges, of court staff and of prosecutors to ensure the continuation of operations and prevent delays in the implementation of the reform process.

Follow some other relevant findings:

- All the new justice institutions had to, at the same time, administer the process of establishing their internal rules of organisation while running their internal administration, as well as exercising their constitutional and legal functions.
- The establishment and functioning of SPOACOC and the National Bureau of Investigation (NBI) was a complicated and over-regulated process. During these operations, the new directors were almost exclusively lawyers who have proved committed and flexible enough to rise to the challenge of management and hands-on administration, despite not being properly trained or prepared for these tasks (*‘juris non calculat’*).
- The procedures and rules of appointment and recruiting are overly regulated and complex. Sometimes the recruitment process for administrative staff (i.e., driver) takes 6 months or more. The supporting staff in some newly established structures

¹⁶ Quotation from Round Table “Making New Justice Reform Institutions Resilient”, organised by CDI with representatives of new justice institutions, in the framework of ALBE project, Tirana, 24 November 2020.

has been transferred from the old structures. As such they were neither cleared, nor properly trained to be immediately operational and efficient in the new structures.

- Logistical and infrastructural resources for the set up and initial functioning of new structures (i.e., working spaces, IT support, archiving systems, etc.) were made available, albeit belatedly. However now these aspects are regulated by law and fall under the remit of the newly established Justice institutions. This ensures their independence, help them meet budget and recruitment requirements in a timely fashion and protects them against political interference.
- The vision and commitment of office holders has been transmitted to the lower levels of the organisation as shown by their dedication and work ethic, notwithstanding the COVID-19 restrictions. To deal with the work surcharge and initial understaffing, the existing personnel have been dealing with a much higher workload than initially forecasted. Regarding the logistical facilities (especially for SPOACOC), even though accommodated temporarily in makeshift reduced office spaces, staff continued to perform their duties.

The ability to function while still in the set-up phase is one of the main take-aways of that period. The main explanatory factor has been the professional and moral figure of the top office holder. We have identified cases where in the absence of support staff, it has been the institution head that has personally managed the HR selection and recruitment, supervised infrastructure work for the new offices or purchase of equipment, or deal with the outreach and communication with third parties.

Within one year from its establishment, the HJC managed to successfully enable the functioning of the High Court and the process of appointment of judges to the Special Court Against Corruption; to improve the system for administration of courts, and; to advance the regulatory framework for the career evaluation of judges, etc. The Council managed to have daily and periodic meetings despite the pandemic. Yet the courts are facing limitations in terms of their functionality: their workload has been increased by 25%, while there is a 15% loss of resources due to the vetting process. A temporary scheme of 'flying judges' has been put in place to share the burden and deal with urgent cases (especially criminal law).

Within the first 11 months from its establishment, and with severe logistical and human resource limitations, SPOACOC started its first investigations into cases; elected the director of the National Bureau of Investigations (NBI), and; commenced the process of selecting candidates for the NBI. SPOACOC has had no problems in terms of budgeting, because the government approved the budget for 2020 before its establishment and met all requests for 2021. Moreover, SPOACOC is allowed to take financing from third parties (it received EUR 1 million from the USA and was expecting more financing in the framework of anti-mafia law).

In anticipation of reaching a quorum (achieved at the beginning of 2021), the Constitutional Court (CC) has continued to decide on the (in)admissibility of cases. Regarding logistic and administrative issues, it has flagged infrastructural constraints posed by the building in which it is located, which has only one courtroom.

The High Justice Inspector (HJI) presents a valuable case study where the head of the institution covers the planning gaps. During interviews it appeared that the head of HJI in the first days of establishment personally set up and arranged the administrative and financial procedures and obligations of the new institutions (right down to setting up

Internet connections and arranging for payment of the public utility bills). After 10 months of functioning, a comprehensive assessment of the working environment led to the formulation of practical legislative and procedural proposals that aim to improve the functioning of HJI (i.e., review of recruitment criteria for legal inspectors, financial issues and inter-governmental relations).

As the decision-making competencies move from elected politicians (for the design and set-up phase) to selected and vetted civil servants (for the operations phase), the impact of political will exercised by the executive and the legislative is expected to fade. The newly established independent heads of justice structures seem to have weathered the initial shock and are slowly but surely operating.

III.3. Sustainability, transparency, learning processes and the strength of partners

The reform has brought about significant change, by cleansing the justice system of a high number of officials who have failed to justify their wealth. Yet, the delays in recruitment and the small pool of suitable applicants have led to backlogs in dealing with cases.

While the justice sector reform has benefitted from broad societal support, the delays, political bickering and large backlog have somewhat dimmed its initial shine. Unrealistic expectations about quickly catching 'big fish' have not played in its favour either. Yet, two developments are contributing to establishing the image of the new institutions. The first is transparency: almost all structures have paid great attention to communication and outreach. Online publication of proceedings has become the rule. Second, gradually the first deliverables have started to appear. While no big fish have been landed yet, a trickle of results have become evident. This includes the functionality of the Constitutional Court and the first indictments from SPOACOC. Hence the public discourse has shifted from delays in establishment and absence of results, to the quality of work of the new structures. The increased transparency on internal functioning and the production of outputs, have contributed to maintain unchanged the overwhelming positive expectations from the justice reform institutions.¹⁷

The support from international partners (EUD, USAID, support projects like Euralius, ICITAP, OPDAT and PAMECA) has proved crucial in this phase. The EU has allocated EUR 133.8 million for Rule for Law and Fundamental Rights for 2014–2020,¹⁸ out of which circa EUR 42 million is directly for justice reform, while different bilateral donors have also committed significant amounts. Moreover, it is to be strongly underlined that after the first moments, the Albanian executive and legislative have picked up the financial bill for the endeavour. Finally, the civil society has been an incomparable, even if underfunded, ally in support of the justice reforms through its critical knowledge, monitoring and advocacy.

¹⁷ The total positive perception of SPOACOC remains within the statistical error margin, shifting from 88,7% in 2019 to 86,4% in 2020: for the Courts it remains virtually unchanged, from 91,81% to 91,2%. See graph 68 and 69 of "Security Barometer in Albania – National Survey 2020", by CSDG.

¹⁸ Albania Financial Assistance under IPA II, at EU Commission, DG NEAR, extracted from: https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/albania_en

In dealing with their teething problems, the newly established institutions are aware that they need to proceed with their reform obligations while keeping in mind the obligations arising from the European Convention of Human Rights, in particular Article 6 of the ECHR which recognises the right to a fair trial and public hearing within a reasonable time.

Regarding sustainability, capitalisation and resilience it is relevant to mention the following observations:

- There is not only a need to secure sufficient budgets for the continued implementation of justice sector reforms; it is also necessary that such budgets are drafted by the institutions themselves, according to their needs in terms of, e.g., case management, training and education, internal audits and reviews of institutions' role and functioning. While their functioning budget for the first year was drafted by external actors (politicians and external consultants), it is those very institutions that have drafted their own budget for the following years responding to their current and long-term needs.
- After overcoming hurdles in the set-up phase, new institutions are building up their own procedures as well as establishing inter-institutional relations. For example, the HJC works on the assumption that the sustainability and independence of the justice institutions is not just a case of logistics, raising capacities and drafting rules, but requires an *esprit de corps* and culture of justice.
- In record time, the HJI has also drafted and adopted integrity compliance rules for the judiciary.
- Despite all these limitations and restrictions, the HPC has shown resilience and leadership. Three of the best practices identified in its activities are: (i) prioritisation (the election of the General Public Prosecutor), (ii) intake of initiative (start of investigation against disciplinary measures for prosecutors, despite the High Justice Inspector not having been established), and (iii) good coordination (start of investigation against disciplinary measures for prosecutors, despite the High Justice Inspector not having been established).

Conclusions

Critics have accused Albania's justice sector reform for its high cost and vulnerability to political tampering, for decimating the numbers of judges and prosecutors, thus leaving the country for years without a functioning Constitutional Court and High Court, and for multiplying backlogs of lower courts, while failing to catch the big – corrupt – fish. They have a point. In a perfect justice reform process of such depth and scope, planning would have included worst case scenarios, the weight of political will of local elites would have been properly taken into account, the limited pool of suitable candidates for judges and prosecutors would have been accounted for, organisational development specialists would have been members of the reform planning team, and public expectations would have been better managed.

But after a difficult start, Albania is the first SEE6 country to have successfully restructured key components of its judicial system.

i) What has worked?

On the political level:

- key actors – internal and external - worked together to muster the political will needed to pass constitutional changes;
- the vetting process is cleansing the judicial system from corrupt elements;
- the new structures have been set up and, while not yet at full capacity, they are functioning.

On the organisational level:

- the profile of the leaders of the new justice structures has been key to further developments. Their values, vision, commitment and versatility have proven crucial for the completion for the set-up phase of the new institutions and the commencement of their regular functioning;
- international support and 'protection' has been necessary to insulate the new structures against malign forces during the set up and first steps of functioning;
- transparency with the media and with the wider public has been costly initially but is expected to pay off in the mid to long term. It has already contributed to public education.

ii) What can the next steps be?

The main and crucial condition is to keep the independence of the (reform) structures intact from political and other interests. Once the mechanisms assuring their throughput legitimacy have been established, the focus should shift towards increasing the efficiency of processes and the quality and volume of deliverables.

The fact that, now that they are functional, the new institutions can prepare their own budget and rules of procedure, and hire their own staff, is a very important step towards their sustainability and resilience. With the consolidation of their organisational structures, specialised administrative positions must be created and filled with a view to enriching the

initially purely legal profile of new hires with financial, human resources and other management profiles. External technical assistance must include support in overall management of the new justice institutions.

Targeted communication with – and better education of – the general population is necessary, on what to expect and how to approach the new justice institutions. Such expectation management would also contribute to an increased quality of individual complaints logged with different courts.¹⁹ It becomes crucial in this context to further develop the alliances of new justice institutions with their CSO and EU/US partners.

iii) Recommendations to be replicated and/or be uploaded in the enlargement methodology and / or disbursement of EU assistance

Regarding the vision, values and political will, use the design phase to:

- i) plan to mitigate the unavoidable intervention by politicians;
- ii) plan for different scenarios and foresee safety nets in case of disruptions. Build capacity for resilience and not only for efficiency;
- iii) plan for all laws and by-laws, while resisting over-regulation. Avoid the cases whereby laws are passed in parliament but the respective by-laws are left to be drafted latter on and passed by executive decision of the Council of Ministers (which lowers transparency and leaves space for capture); and
- iv) plan and invest in the in-house culture (*esprit de corps*) and internal modus operandi of each justice institution. This requires, inter alia, leadership from management, a good exchange of information, continuous training and capacity-building.

Regarding the key competences, basic infrastructure, internal Rules of Procedure, technical and financial resources, when setting up the new structures:

- i) scope the available resources in finance and human capital, and design the future system accordingly;
- ii) build in an inception period;
- iii) provide flexibility in the regulation for recruitment of temporary replacements and administrative staff; and
- iv) establish a set of key indicators for institutions to measure their own performance and create internal mechanisms of monitoring. Complement any external assistance with management development expertise.

Regarding the sustainability, transparency, learning processes and the strength of partners:

¹⁹ For example, to improve citizens' access to (and the workload of) the Constitutional Court, standard application forms, similar to those used by the European Court of Human Rights, could be drawn up. That would make it easier for citizens to submit a case despite lacking legal knowledge. Another instrument would be to strengthen the capacities of the bar association for submission of applications before the CC or other courts.

- i) straighten throughput legitimacy mechanisms by perfecting efficiency, transparency, accountability, predictability, sound financial management, fighting corruption;
- ii) improve citizens' access to courts by drafting standard application forms, to make it easier to submit a case despite lack of legal knowledge. Also strengthen the capacities of the bar association for submission of applications before the Constitutional Court;
- iii) establish new channels and methods of communication with civil society organisations and the wider public in order to disseminate information about justice sector reform and the tasks and responsibilities of the (new) justice institutions. There is a need to package the information to make it easier for citizens to follow and understand; and
- iv) create external mechanisms involving representatives of civil society, academia, bar associations, etc., to monitor the strategic action plans of the new justice institutions.

* * *

Administering deep-cutting reforms that include building new key institutions demands time, all the more so when such reforms are part of the democratic transformation of countries such as the SEE6. While a 'problem-solving' approach is necessary to identify where the problem resides and what to fix, the 'appreciative inquiry' method is adapted to better use a country's endogenous resources, to build on the positive core strengths of (reform) structures, and to use local strengths and the population's aspirations based on European values.

Applying this method in the entire judicial system of a country is a resource-intensive proposition. But the method is very precious in selected high-value entry-points for policy makers and system reformers. The performance indicators should also include sustainability resilience on top of efficiency. For the new structures to flourish, the appropriate environment – positive, supportive and open – should take into account the available endogenous resources.

In conclusion, after the first year of operations with Albania's reformed justice institutions, the design flaws in the planning phase have more or less been overcome. Political will has accrued during the set-up phase mainly due to the extra-rigorous vetting of the newly recruited personnel, close monitoring by civil society, the support of international partners and – very importantly – the work ethic injected into the new institutions. Even though faced with huge challenges, their governance seems to be gradually falling into place. Human resources, finance, internal rules and logistical issues seem to be on track for resolving. The next challenges are shielding them from political interference and improving their governance.

LIST OF ANNEXES

ANNEX 1. Guiding questions for semi-structured interviews

General

- What has worked well in the justice sector reform process?
- Which positive macro trends can be discerned?

Reform partners

- Which mix of domestic (and external) stakeholders is key to ensure success? How do these stakeholders complement and reinforce each other? Which values should they represent?
- How to involve key political constituencies and rally them behind the same flag so as to create champions of reform?

Design

- What strengths did the vision of justice reform, and its formulation, encompass?
- What are the benefits of a top-down and a bottom-up approach to reform?
- Does it make sense to design a Plan B? If so, which are the variables that could facilitate compromise without detracting from the overall goal?
- Which alternatives exist to the cascade methodology and the sequential triggering system (need to close one step in order to advance to the next)? Do these alternative methods enhance efficiency and sustainability to reform? Do they lessen the reliance on external assistance?

Implementation

- Which basic infrastructure and knowledge could be relied upon?
- Which learning processes were put in place to guide the reform process?
- Were organisational achievements marked/'celebrated' and, if so, how?
- Which technical and financial assets and resources were essential in following through with the implementation process?

ANNEX 2. Interviews

- Mr. Arben KRAJA, Head of SPOACOC
- Ms. Naureda LLAGAMI, Head of HJC
- Mr. Gent IBRAHIMI, Head of HPC
- Ms. Marsida XHAFERLLARI, Member of Constitutional Court
- Ms. Adea PIRDENI, Deputy Minister of Justice
- Ms. Rudina HAJDARI, Chair of Parliamentary Committee on EU Integration



SECURING THE RESILIENCE OF JUSTICE SECTOR REFORM IN ALBANIA

©Cooperation and Development Institute. All rights reserved.
Tirana, March 2021

Cooperation and Development Institute
"Milto Tutulani" Street, Building No. 6, Entry 8, 3 & 4, 1019, Tirana, Albania
E-mail: info@cdinstitute.eu
Website: www.cdinstitute.eu