

Achieving independence and accountability. A comparative analysis of the post communist judicial systems in Albania and Bulgaria

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ABSTRACT

The judiciary plays a unique role in a democratic society, where rule of law reigns. Its independence is a prerequisite of a system designed to protect the fundamental human rights and freedoms and a guarantee of a fair trial.

In order to have a truly independent Judicial branch it is necessary to put in place sufficient guarantees that will insulate the judiciary from political pressure and will dress the judges with the necessary independence that will enable them to issue decisions without fear of improper influence and only on the basis of facts, law and their inner conviction.

Through a comparative analyze of the judicial systems of Albania and Bulgaria these thesis will assess the state of judicial independence and judicial accountability in the two countries and try to identify problems and propose solutions by not only referring to principles but also assessing the current rules by taking the practical results into consideration and their contribution to the goals of a just society.

While this thesis will focus on judicial independence, it is important also to realize that in a system of “checks and balances” complete and total independence of the judiciary is not the goal and a substantial distinction should be drawn between judicial independence in the classical sense of freedom from pressure or influence in deciding cases and complete independence from overall accountability and oversight. Judicial independence and judicial accountability must balance each other.

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Introduction

In a democratic system of checks and balances the branches of power has independence from each other and at the same time the ability to check and restrict the other branches in certain circumstances. In this manner, if one branch abuses its power and transcend their legal limits, the other branches will have the competency to correct the situation.¹

The judiciary as it is called the less dangerous branch² plays a unique role in a democratic society, its independence is of fundamental value to the rule of law and guarantee of a fair trial.³ It is difficult to imagine how a State could ensure democracy and achieve the goals of a just society without an independent judiciary, or how it could effectively secure the rights of the individuals without impartial judges.

As Hamilton stated in Federalist paper nr. 78, *“the judiciary can never attack with success either of the other two branches and minimally is requisite to enable it to defend itself against their attacks”*. Therefore the judiciary must have some degree of independence from outside interference, that can impinge and encroach on the autonomy of the judiciary collectively or of the individual judge.⁴

The interrelation between judicial independence and public perception in that independence is crucial and the basis for the legality of the judicial branch which is in place with the core mission

¹ Madison, the federalist paper nr.48 as available at: <http://www.yale.edu/lawweb/avalon/federal/fed48.htm>, last visited 12.02.2008

² Hamilton, the federalist paper nr.78 as available at: <http://www.yale.edu/lawweb/avalon/federal/fed78.htm>, last visited 12.02.2008

³ Opinion no. 246/2003, European Commission for democracy through law (Venice Commission) Comments on constitutional amendments reforming the judicial system in Bulgaria by Mr Orlando Afonso, Venice commission as available at: [http://www.venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)060-e.asp), last visited 12.02.2008

⁴ Petter H., Russell, and David M., O'Brien (eds.), «Judicial Independence in The Age of Democracy,» University Press of Virginia, 2001, at 11.

of ensuring the rights and freedoms of citizens. In case the people lose the trust in the judiciary and not see it as independent and impartial, they will not turn to the courts to find solution for their problems but will look for other means, be it through political or different extralegal ways.⁵ Since a controller who is not independent of those being controlled cannot be effective⁶, it is necessary to put in place sufficient guarantees that will insulate the judiciary from political pressure and will dress the judges with the necessary independence that will enable them to issue decisions without fear of improper influence and only on the basis of facts, law and their inner conviction.

However judicial independence cannot be absolute and it is not an end in itself. The independence that society grant to judges must not be seen as a privilege in their interest but as a guarantee of those being judged⁷.

Many contend that accountability and independence are apposite terms inherently contradictory⁸. However a substantial distinction should be drawn between judicial independence in the classical sense of freedom from pressure or influence in deciding cases and complete independence from overall accountability and oversight.

In addition methods and rules must be in place to ensure that the judiciary does not exceed its constitutional power. Thus, while this thesis will focus on judicial independence, it is important also to realize that in a system of checks and balances complete and total

⁵ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd. Page 17

⁶ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 19

⁷ Opinion no. 246/2003, European Commission for democracy through law (Venice Commission) Comments on constitutional amendments reforming the judicial system in Bulgaria by Mr Orlando Afonso, Venice commission as available at: [http://www.venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)060-e.asp), last visited 12.02.2008

⁸ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 18

independence of the judiciary is not the goal. The goal is a system of government whereby each independent branch has the ability to counterbalance the other branch, while controlling and effectively checking when they exceed the constitutional limit of their power.⁹ Therefore mechanisms must be put in place to check and properly restrain the judiciary.

This thesis will focus and assess the state of judicial independence and judicial accountability in Albania and Bulgaria. The achievements attained by these countries in the area of judicial reform in recent years, the main factors contributing to that success and the major problems they faced in the period which is subject of comparative analyze with regard to, judicial independence and judicial accountability.

Before the fall of communism the concept of an independent judiciary was inexistent in the two states subject to analyze with comrade courts politically subordinated to the Government and the ruling party. Telephone law was part of the legal framework of these countries, with high officials calling judges and ordering them to rule in a certain way¹⁰

After the fall of communism the two states adopted western models and international standards in their legal system. Accordingly when one read the relevant provisions of the constitution and the laws concerning the judiciary, its not an exaggeration to say that these countries posses two of the most independent Judiciaries of the post communist states. This is a kind of paradox. Despite the significant progress made over recent years in the area of judicial reform the current performance of the Judiciary in the two countries under examination, leaves something to be

⁹ Madison, the federalist paper nr.48 as available at: <http://www.yale.edu/lawweb/avalon/federal/fed48.htm>, last visited 12.02.2008

¹⁰ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 8

desired, and it is widely believed to be inefficient and corrupt. The majority of the people strongly prefers to avoid courts as they are seen as unreliable and corrupt rather than venues for the distribution of justice .¹¹

Through o comparative analyze of the judicial systems of these countries these thesis will try to identify problems and propose potential solutions while not only referring to principles but also assessing the current rules by taking the practical results into consideration and their contribution to the goals of a just society .

¹¹Bruno Schönfelder , Judicial Independence in Bulgaria: A Tale of Splendor and Misery, **Published in:** Europe-Asia Studies, Volume 57, Issue 1 January 2005 , Professor Terry Cox - *University of Glasgow, UK(eds), Publisher: Routledge, University of Glasgow, at 61*

I. Constitutional and legal foundations ensuring judicial independence in Bulgaria and Albania.

A. Guarantees of the separation of powers or independence

International standards on judicial independence require that the independence of the judiciary “be guaranteed by the State and enshrined in the Constitution or the law of the country”.¹²

It is of core importance that the independent role of the judiciary in general and of the individual judges in particular is explicitly set out in the constitution of a State. Also it is worth mentioning to a structure of judicial independence - officially establishing in the constitution - that the judiciary is a distinct ability or is autonomous of the legislative and executive branches helps defend against politically motivated intervention. In addition to that, as long as it enjoys overt and vigorous guarantees of independence, it should be clear-cut that the judiciary can run independently still where it is not constitutionally identified as a distinct ability¹³.

However an explicit reference of the principle of the separation of powers seem essential as safeguard to preserve the judicial zone immune from trespass by the other branches¹⁴ and still has a major role to play in the protection of individual rights and the respect of the rule of law. Especially the independence of the judiciary from the executive is of fundamental importance. At a minimum, where its not established that the judiciary constitute a separate branch the constitution must embrace the principles of an independent judiciary and institutionalize strong

¹² UN Basic Principles on the Independence of the Judiciary, 1, See full text of the Principles at http://www.unhchr.ch/html/menu3/b/h_comp50.htm, last visited 01.03.2008

¹³ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch ltd, pages 33-34

¹⁴ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch ltd, page 34

guarantees of judicial independence to enable the judges to rule in an autonomous way subject only to the provisions of the Constitution and the law itself¹⁵.

Establishing robust guarantees for the judicial independence by means of a new constitution in Albania and Bulgaria was the goal to be achieved, because the subordination and dependence of judges to the government was widely perceived as one of the most undesirable features of the former communist system in both countries. This was strongly felt by most Bulgarian and Albanian jurists, who were aware of the fact that without an independent judiciary, democracy in these countries could not succeed.

In both countries subject to analyze the judiciary is identified as constitutionally separate and independent from the other two powers. Article 7 of the Constitution of the Republic of Albania explicitly declares the separation and balance of powers among the executive, legislative and the judicial branches¹⁶. The Bulgarian Constitution establish the principle of separation of powers by declaring that *“the power of the state shall be divided between a legislative, an executive and a judicial branch.”*¹⁷ However, while the separation and independence provided in the Albanian Constitution is addressed to the judiciary as a whole that is to say only to judges, in the Bulgarian constitution it refers to the magistracy – which is composed by not only judges but also by the prosecutors and the investigators¹⁸, creating undesirable opportunities for involvement of the executive in the affairs of the judiciary and blurring the separation of

¹⁵ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 33

¹⁶ Article 7, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 01.03.2008

¹⁷ Article 8, Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 01.03.2007

¹⁸ Article 135, Constitution of Albania, id; article 117.2 , Constitution of Bulgaria, id.

powers proclaimed in Article 8 of the Bulgarian Constitution.¹⁹ In order to maximize the judicial independence and to avoid possible intrusions of the executive branch, it is of core importance that the clear separation of powers as well as the independence of the judges should not be in any case distorted – while there are cases that such independence can be easily limited for the abovementioned reasoning.

In addition, both Constitutions proclaim the independence of individual judges. Accordingly, while exercising their judicial functions, judges are subordinated and subject only to the Constitution and the law.²⁰ Moreover, the Constitutions of the countries, subject of this analysis include special provisions to ensure greater judicial independence. We can mention here examples such as: life tenure for some judges and a fixed employment term for other judges, the administrative and budgetary independence of the judiciary, judicial immunity, etc.

An important prerequisite which has an impact on the judicial independence is that the establishment of extraordinary courts should be expressly prohibited, allowing only courts established by law to exercise the judicial power and distribute justice.²¹ This principle is set forth in both Constitutions of Bulgaria and Albania²².

In order to appear and be neutral upon becoming a judge the individual seeking judgeship must relinquish all other jobs or positions he/she may have held previously. If they hold jobs or other positions outside the judiciary while they are working as a judge they may consciously or unconsciously favor the state agency, firm or business where they work by seriously

¹⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 82

²⁰ Article 117 (2), Constitution of Bulgaria, Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 01.03.2007; article 145.1, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 01.03.2008

²¹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 35

²² Article 135.2, Constitution of Albania id; article 119.3, Constitution of Bulgaria id

undermining their impartiality. Therefore, in order to minimize the potential conflict of interest cases that may endanger judges' position to remain truly impartial and independent, safeguards must be put in place to limit to the greatest extent anything that could conceivably be viewed as affecting a judge's impartiality.²³

The Albanian Constitution states clearly that “*Being a judge is not compatible with any other state, political or private activity*”²⁴. In Bulgaria as long as they hold their office, judges may not be members of Parliament, government minister, deputy minister, mayor or municipal counselor or any elected or appointed office in state, municipal or economic bodies.²⁵ As well, judges' commercial or professional activities outside of the judiciary are mostly prohibited and this is noticed in both Constitution and laws of Albania and Bulgaria. In light of this, apart from the fact they are permitted to be involved in scholarly and artistic activities, judges can not engage themselves, can not practice/exercise law outside of the courtroom or be at the same time in the role of advocates.²⁶ Although sufficient safeguards are put in place by both countries in order to prohibit the judges from improper relationships with other state entities or with private parties, in a manner which enhances their independence and impartiality, a problem which could jeopardize judicial independence is observed in Bulgaria.

Once the judges have terminated their services working at the Inspectorate of the Ministry of they have the right to be re-positioned in their previous positions, and their term of office in public offices is always counted as legal experience. So in practice, judges can in a flexible way

²³ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd. Page 37-38

²⁴ Article 143, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 01.03.2008

²⁵ Arts. 132 (1), 132(2), 132(3). Judicial System Act Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 01.03.2008

²⁶ Article 143 Constitution of Albania id; arts 132.(2), 132(4),132(5) Judicial System Act id .

be working back and forth in the judicial and the executive but at the same time ensuring that such thing will not jeopardize the separation of powers or deteriorate the independence of the judiciary and of the judges themselves. To illustrate such example, the judges have the chance to be selected and appointed into civil service or political positions but they need to guarantee that they have “*the right motivation to serve*” for being selected for a certain position.²⁷

While not all factors and guarantees of judicial independence can necessarily be specifically included in a constitution, they are important to judicial independence and they have to be addressed and shall be defined in legislative acts related to the judiciary.

B. Representation of the Judiciary and the composition of the Judicial Councils

The representation of the judiciary is a matter of fundamental importance since only through a proper representation the judicial branch can communicate as an equal partner with the other branches of the government. This representation will enable the judiciary to raise its voice when needed, not only to restrain the political branches from unduly interfering with its independence²⁸ but also to make the case in negotiations on a range of issues on which the interests of the judiciary and the executive may conflict. A truly independent judicial branch ought to represent its interests and not rely on the other branches for making its case.²⁹

²⁷ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 86

²⁸ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 34

²⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 35

This is why most international standards sees independent bodies as appropriate to ensure greater independence of the courts.³⁰ Both the Albanian and the Bulgarian Judiciaries are represented by independent Judicial Councils. The Albanian High Council of Justice is a constitutional body responsible for: proposing to the President of the Republic the nomination of judges of the courts of first level and courts of appeal, transfer as well disciplinary responsibility pursuant to law, removal, education, moral and professional evaluation, career, and oversight of first instance and appellate court judges.³¹ Broad competences over judicial representation and administration are vested in the Bulgarian Supreme Judicial Council.³²

However in the case of Bulgaria, there are serious deficiencies regarding the structure of the council. This is especially true in relation to its mixed composition – which includes the Minister of Justice, 11 members elected by Parliament, prosecutors and investigators. The representation of other magistrates in the Council and its mandate to represent the whole magistracy broadens its scope and makes it less effective in representing judges' interests and protecting their independence.³³

One of the most important factors, which has a significant impact on the independence and effectiveness of the Judicial Councils is related to their composition. It is clear that while the aim behind achieving independence is to minimize the influence of the political branches, the composition of councils to a greater extent with appointees of the executive or legislative does

³⁰ UCJ, Art 11(2) The Universal Charter of the Judge by the International Association of Judges (1999) as available at: <http://www.iaj-uim.org/ENG/07.html>, last visited 03.03.2008

³¹ Arts 147.4, 147.5, 147.6, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 03.03.2008 ; art 2, Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No 99 date 29.12.2005 as available at: <http://www.kld.al/>, last visited 03.03.2008

³² Arts 129. (1), 129. (2), 129.(3), 130 (6), Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 03.03.2008

³³ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch ltd, page 83

not serve that purpose. On the other hand the involvement of officials from the other branches in the composition of the judicial council may ensure real accountability.³⁴

Under Article 147.1 of the Constitution of Albania, the HCJ consists of the President of the Republic, the President of the High Court, the Minister of Justice, three members elected by the Assembly (*Parliament*), and nine judges of all levels elected by the National Judicial Conference.³⁵ Thus, out of 15 members of the HCJ, at least 10 of them are judges. Therefore, the membership of HCJ consists also of non-judges, but the majority of the members are from the ranks of the judges.

Members of the High Council of Justice elected by the National Judicial Conference must have served as judges for no less than ten years whereas the members elected by the parliament must be jurists, who are not judges, with a minimum of 15 years legal experience. The parliamentary and the NJC representatives are elected for a 5-year term without the right of immediate reelection.³⁶

The Supreme Judicial Council of Bulgaria is composed of 25 members, eleven of which are elected by Parliament and another eleven by the three bodies of the Judicial branch. The elected members of the Supreme Judicial Council serve single five-year terms and are not eligible for immediate re-election. Sitting on the Council ex officio are the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court and the Chief Public Prosecutor. In addition, the Minister of Justice serves as the chair, though he has no right to vote. Eligible for election to

³⁴ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 44

³⁵ Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 03.03.2008

³⁶ Arts 4, 6.1 of Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No 99 date 29.12.2005, as available at: <http://www.kld.al/>, last visited 03.03.2008

the Supreme Judicial Council besides its ex officio members are practicing lawyers of high professional and moral integrity with at least 15 years of professional experience.³⁷

Unlike the High Council of Justice in Albania, the Bulgarian Supreme Judicial Council represents all three kinds of magistrates, not only judges. While the number of magistrates predominates in the composition of the Council, the same thing cannot be said for the judges (*only six of them are elected by the corps of judges*).

It is true that the members representing the three parts of the judicial branch have separate competencies, but for the majority of matters the Council acts as a single body, meaning that the representation of the courts is entrusted to a body which is composed in most part by non-judges. Practice has shown that this model does not enhance judicial independence and creates harmful problematic linkages between the courts and the executive branch.³⁸

Creating a council with a majority from the political branches can defeat the goal of avoiding administrative functions being politicized.³⁹ The members elected by the parliament have been often regarded as political loyal to the Government, rather than as impartial representatives. Whilst in the case of the Albanian HCJ, this may not constitute a problem, considering the small number of members selected (3) by the parliament in comparison with the number of judges (10), it may constitute a problem in case of the Bulgarian SCJ (*11 of the members are elected by the parliament*).

While individual members appointed by Parliament seem to indicate that they do not act according to party lines and that their voting trends may indicate to be defined by personal or

³⁷ Arts. 130 (1), 130(2), 130(4), 130(5), Bulgarian Constitution Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 03.03.2008

³⁸ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch ltd. Page 85

³⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch ltd. Page 45

professional allegiances among members, the two interventions of the Bulgaria legislature altering the rules governing the composition of the Council resulted in the removal of individuals sitting in the Council. This indicates that other branches do not miss any chance to weaken the Council's ability to be an independent actor capable of defending judicial independence⁴⁰

Also in Albania during 2005, the parliament tried to control the composition of the HCJ by passing a law prohibiting a HCJ member from serving in the council while at the same time performing functions as a judge.⁴¹

At the time many had the impression that the law was enacted as a maneuver in order to affect the political outcome of elections. Since the HCJ has the right to propose one member to the Central Election Committee⁴², it could determined the political orientation of the CEC which at the time was equally divided between the majority and the opposition, and the name proposed by the HCJ could made the difference.⁴³ In response to this attempts the Constitutional Court invalidated the law on the grounds that the government was impinging on the independence of the judiciary and the positions must be filled by only by judges as explicitly required by article 147 of the Constitution.⁴⁴

⁴⁰ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 84

⁴¹ ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 03.03.2008

⁴² Art 22, Law No. 9087, dated 19 June 2003, "The Electoral Code of the Republic of Albania", published in SG Nr.52, date 01.07.2003 as available at:

<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016504.pdf>, last visited 03.03.2008

⁴³ ABA CEELI, Judicial Reform Index for Albania 2006 id

⁴⁴ Decision No.14, date 22.05.2006 of the Constitutional Court of Albania, as available at: [http://www.gjk.gov.al/vendimi06.html#Vendimi.%20nr.14,%20datë%2022.05.2006%20\(V-14/06\)](http://www.gjk.gov.al/vendimi06.html#Vendimi.%20nr.14,%20datë%2022.05.2006%20(V-14/06)), last visited 03.03.2008

C. The Role of Constitutional Courts

The prerogative to determine the ultimate constitutionality of legislation and acts taken by the executive for compliance with the Constitution is entrusted in the Constitutional Courts of both countries under analysis. These Courts are the final arbiters for constitutional issues and are in charge of guaranteeing respect for the Constitution.

The Constitutional Courts of Albania and Bulgaria are not part of the judiciary and a separate chapter in the constitution is devoted to them. They are considered to be quasi judicial bodies (*not courts in the strict sense of the word*) as a result of their closer connection to political matters. Therefore, the political branch has a greater say in the selection and appointment of Constitutional Court judges, and they always serve for a fixed period of time.⁴⁵

Here is worth mentioning, that the Constitutional Court undoubtedly enjoys and should have all the guarantees of an independent body the same as any other normal court in order to exercise its proper adjudicative role.⁴⁶ Both Albania and Bulgaria has established the independence of their Constitutional Courts from the legislative and the executive.

The Constitutional Court of Bulgaria consist of 12 judges, one-third of whom is elected by the National Assembly, one-third appointed by the President, and one-third elected by a joint meeting of the judges of the Supreme Court of Cassation and the Supreme Administrative Court⁴⁷. Unlike the CCB the Constitutional Court of Albania is composed of 9 members, which are appointed by the President of the Republic with the consent of the Assembly.⁴⁸

⁴⁵ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch Ltd, page 36

⁴⁶ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch Ltd, page 37

⁴⁷ Art 147.1, Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 06.03.2008

⁴⁸ Art 125. 1, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 06.03.2008

As mentioned above the judges of the Constitutional Courts of both countries shall be elected or appointed for a period of nine years and shall not be eligible for re-election or re-appointment.⁴⁹

The limited term in office and the ban on reelection or reappointment is seen as a guarantee for the independence of this important body.⁵⁰ Eligibility for the position of a judge in the Constitutional Courts of the two countries is restricted to lawyers of high, professional and moral integrity and with not less than fifteen years of professional experience.⁵¹ Therefore there's a theoretical possibility that none of the members of the court would have been a judge prior sitting in the Constitutional Court bench⁵².

In both Countries these courts have played an important role in providing a shield for the autonomy of the Judicial branch against the attacks of the political branches, and often managed to act as pathfinders for the judiciary and clarified questions on separation of powers.⁵³

They have been active and sometimes effective in taking stubborn positions in support of judicial autonomy issuing rulings restraining the other branches from interfering in the affairs of the judiciary as whole or with the independence of individual judges. In one of its judgments the Bulgarian Constitutional Court determined that “ *the judiciary is statutorily identified as the state authority administering justice, suggesting an exclusive competence, and its rulings cannot be revoked or abolished by the other branches*”.⁵⁴ In other rulings it has held that since the

⁴⁹ Art 147.2, Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 06.03.2007; art 125.2, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 06.03.2008

⁵⁰ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 06.03.2008

⁵¹ Art 147.3, Constitution of Bulgaria id; art 125.2, Constitution of Albania id

⁵² ABA CEELI, Judicial Reform Index for Bulgaria 2006, Id

⁵³ Bruno Schönfelder, Judicial Independence in Bulgaria: A Tale of Splendor and Misery, Published in: Europe-Asia Studies, Volume 57, Issue 1 January 2005, page 68

⁵⁴ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch Ltd, Pages 82: Judgment of 14 January 1999, State Gazette, No. 6, 22 January 1999.

budgetary independence of the judiciary is constitutionally guaranteed the executive must incorporate the Council's draft proposal into the annual budget without modification and submit it as originally delivered by the SCJ to the Parliament.⁵⁵

On the other hand the Albanian Constitutional Court in three of its decisions ruled that the MoJ and HCJ cannot examine complaints based on the quality of judicial decisions, unless it pertains to a violation of ethical rules, ensuring in this way more protection to the independence of individual judges.⁵⁶

Based on the annual reports of JRIs for Bulgaria, more specifically in 2002, 2004 and 2006, the Constitutional Court enjoys an excellent reputation for independence and effectiveness.

Such body has been cited as the most important instrument and a major provider for the institutional solidity and stability in the country. While it is worth mentioning that many of its decisions of this court have had high notorious character and they not been all the time endorsed by the public, it is a fact that the work and the judgments of the Court and its judges are highly admired respected and enforced.⁵⁷

As the author Bruno Schönfelder in his work *Judicial Independence in Bulgaria: A Tale of Splendor and Misery*, mentioned - *"When the legal scholar Sajo' (1999) wrote of the Hungarian constitutional court that within a decade it had voided more laws than the US supreme court in two centuries, he could have extended this statement to the Bulgarian*

⁵⁵ Judgment of 16 December 1993, State Gazette, No. 1., 4 January 1994, Decision No. 18 of Dec. 16,1993, SG No. 19 (Mar. 9, 1993); Decision No. 4 of Oct. 7, 2004, SG No. 93 (Oct. 19, 2004), of the Bulgarian Constitutional Court

⁵⁶ Decision No. 29 (April 30, 2001) as available at: <http://www.gjk.gov.al/vendimi01.html#11>, last visited 07.03.2008; Decision No. 11 (April 2, 2003) as available at: <http://www.gjk.gov.al/vendimi03.html#11>, last visited 07.03.2008; and Decision No. 17 (Nov. 12,2004) as available at: [http://www.gjk.gov.al/vendimi04.html#Vendimi%20nr.17,%20datë%2012.11.2004%20\(V%20-%2017/04\)](http://www.gjk.gov.al/vendimi04.html#Vendimi%20nr.17,%20datë%2012.11.2004%20(V%20-%2017/04)) , last visited 07.03.2008. of the Albanian Constitutional Court

⁵⁷ ABA CEELI, Judicial Reform index for Bulgaria 2002, 2004, 2006 as available at: http://bulgaria.usaid.gov/37/news_item.html, last visited 08.03.2008

constitutional court”⁵⁸. Unfortunately the same thing cannot be said for the Albanian Constitutional Court. Despite the extended powers and competences that the court has, the other branches doesn’t always respected its decisions.⁵⁹

Based on the annual report of 2004 of JRI, the former Prosecutor General, Arben Rakipi has been dismissed from his position back in 2002, based on an investigation carried out with the proposal of the Assembly and later on finalized with the approval of the President. During the appeal procedures, the Albanian Constitutional Court could bring out the fact that the whole process commenced by the Assembly was not at all in line with the due process protections, and for this reasons, the Court has decided to allow a due and fair process to Mr. Rakipi and at the same time such decision was binding for the Assembly. In contrary to that, the Assembly just decided to propose the appointment of a new Prosecutor General. As a result of this pure insolence case and in order to show to all the importance of the Court’s authority, the Chairman of the Assembly resigned.⁶⁰

Another method, this time a little bit different from the first one, was used almost two years ago while establishing an investigation commission for Mr. Sollaku, the successor of Mr. Rakipi. Based on the Assembly’s Decision No. 31, date 5 May 2006, a Clinton-esque independent inquiry commission was established to supervise the work carried out until then by the Prosecutor General. The basis of this inquiry was the review of 80 cases investigated by the Prosecutor’s General Office and a supposed organized crime network and obvious connections with the Prosecutor General. This time, the Assembly’s commission tried to be a lot more wary than the first time and respect the due and fair process formal procedures by only giving proper

⁵⁸ Bruno Schönfelder, *Judicial Independence in Bulgaria: A Tale of Splendor and Misery*, Published in: *Europe-Asia Studies*, Volume 57, Issue 1 January 2005, Professor Terry Cox - *University of Glasgow, UK(eds)*, Publisher: Routledge, University of Glasgow, at 62

⁵⁹ ABA CEELI, *Judicial Reform Index for Albania 2004 and 2006* as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 08.03.2008

⁶⁰ ABA CEELI, *Judicial Reform Index for Albania 2006*, id

notice. Despite all this, the Constitutional Court – on December 2006 – stated that such commission has heavily surpassed its constitutional mandate by dealing with the investigation of works carried out by the PG's Office and overseeing all his decisions during the given period. In addition to that and based on the current criminal legal framework namely the Criminal Procedure Code and the organic law on the prosecution office, only the PG has the right to examine and evaluate the decision of a lower prosecutor.⁶¹ Worth mentioning here is that the President of the Republic, preceding the Court's decision, has decided to refuse the outcomes of the investigation commission resulting in the proposal for the dismissal from the office of Mr. Sollaku. Based on several sources at that time, the overzealousness of this commission to get unreasonable rid of the Prosecutor General, enabled the President to calmly judge the proposed dismissal and the end to refuse it.⁶²

⁶¹ Article 24, Code of Criminal Procedures of the Republic of Albania as available at: <http://www.legislationline.org/upload/legislations/0f/55/d46a10bcf55b80aae189eb6840b4.htm>, last visited 08.03.2008

⁶² ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 08.03.2008

II. Budgetary and administrative independence of the courts in Bulgaria and Albania

A. Judicial administration and the role of the Judicial councils

The judiciary can be truly independent only if it is self-administered. Excessive administrative authority and control by another branch over judicial affairs could result in administrative functions being politicized, in a manner which inevitably threatens the independence of the Judiciary, unless the it has some form of input into its administration and necessary safeguards are put in place to prevent bodies vested with administrative functions from using their authority to interfere with judges' core decision-making independence.⁶³

In order to ensure transparency while administering the courts, well structured independent bodies should be in place for reducing the degree of interference risk of political pressure from outside. Nevertheless, in order to increase and promote accountability of the judiciary, an optimal degree of political branches involvement should be feasible.⁶⁴

The competences related to the administration of the judicial system in Albania are vested and divided between the High Council of Justice and the Ministry of Justice. Although the High Council of Justice has extended powers concerning the administration of the judiciary, the Ministry of Justice retains an important role alongside the High Council of Justice which may constitute the possibility for improper executive interference in judicial administration and may allow the executive indirectly to affect core judicial decision-making especially through its controlling and disciplinary powers. The HCJ is responsible for: proposing to the President of

⁶³ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 40

⁶⁴ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, pages 40-42-44

the Republic the nomination of judges of the courts of first level and courts of appeal; transfer as well disciplinary responsibility pursuant to law, removal, education, moral and professional evaluation, career, and oversight of first instance and appellate court judges, appointment and removal from office of presidents and vice-presidents of lower courts and also nominates and discharges inspectors of the High Council of Justice Inspectorate.⁶⁵

Currently, the Directorate of Judicial Organization and Inspection at the Ministry of Justice exercises some of Ministry's main tasks with respect to the judicial branch. The core duties of this Directorate encompass: a) carrying out inspections regarding the organization and work of judicial services and judicial administration and proposing the necessary sanctions, b) preparing recommendations regarding legal and organizational measures for the functioning of the judicial power and to justice in general⁶⁶. The appointment and removal from office of Chancellors of courts of first instance and courts of appeal and the supervising of the system of enforcement of criminal and civil judgments is also a competence of the MoJ.⁶⁷

Unlike the HCJ the Supreme Judicial Council of Bulgaria has more broad formal competences; appoints, promotes, demotes, transfer and remove magistrates from office; organize the

⁶⁵ Arts 147.4, 147.5, 147. 6 Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 09.03.2008; art 2, Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No 99 date 29.12.2005 as available at: <http://www.kld.al/>, last visited 09.03.2008.

⁶⁶ Art 11 Law No.8678, dated 14.5.2001 "On the organization and functioning of the Ministry of Justice" published in SG Nr 27, date 05.06.2001. as available at: <http://www.kld.al/> , last visited 09.03.2008

⁶⁷ Consultative Council of European Judges (CCJE) Questionnaire for 2007 CCJE opinion concerning the councils for the judiciary , available at : [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE/REP\(2007\)21&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE/REP(2007)21&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3), last visited 09.03.2008

qualification of judges; adopt the draft budget of the judiciary; makes proposals to the President concerning appointment of the Presidents of the Supreme Court and of the Supreme Administrative Court, acts as the disciplinary authority for the judiciary, determines the number, seat and geographic jurisdiction of courts; establish the number of magistrates and determines the pay of a number of judges; approves the ethics code for judges; and makes tenure decisions concerning magistrates.⁶⁸

In conjunction with the leading character of the Supreme Judicial Council, the Ministry of Justice - on the other hand – has a say on important administrative issues as well as plays a supervisory role. As an outcome of a current essential change in the constitution, the Ministry of Justice was empowered more with respect to the abovementioned areas, including proposing the draft judicial system budget and submitting it to the SJC for consideration; managing the property of the judiciary; making proposals for appointment, promotion, demotion, transfer and other career decisions of magistrates; participation in the organization of the training magistrates, supervisory competencies, etc.⁶⁹ It is of crucial importance that while the aforementioned administrative functions are carried out, the separation of powers and independence of the judiciary is guaranteed and the Ministry of Justice fully respects such principle.

A problem faced by the two countries is a blurred distinction and the absence of a clear demarcation line between the functions of the Judicial Councils and the Ministry of Justice especially with regard to court inspection. Both countries have established two inspectorates with

⁶⁸ Arts 129.(1), 129.(2), 129.(3), 130 (6) of the Bulgarian Constitution Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 13.03.2008, article 27, Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 13.03.2008

⁶⁹ Article 130a, Constitution of Bulgaria, id

a very blurred distinction among each other. One inspectorate is attached to the judicial councils and the other one consisting of a certain number of inspectors is attached to the Minister of Justice.

The main task of the inspectorate of the High Council of Justice is to exercise control on the judiciary on behalf of the HCJ. It is worth mentioning here, that while the duties and competencies HCJ inspectors are quite clear (*apart the procedural aspect of their operations*), those of the ministerial inspectors are very vague and formulated in an ambiguous way. In relation to that, when time comes to carry out procedures on the investigation and decision making on issues related to misbehaviors of judges, it is very difficult to have a clear picture on the proper procedures and how they should take place and the operations of the two inspectorates often overlap. Alongside with that, there is no equal treatment for both categories of inspectors, while the HCJ inspectors have the status of a judge in the appellate courts (*worth mentioning they also do enjoy the immunity benefits*), the inspectors at the Ministry are just simple civil servants. At this point, a confusion is created between, a somehow clear role and functions of the HCJ inspectors and an ambiguous position of inspectors' at the Ministry of Justice.⁷⁰

B. Budgeting Process

Apart from other factors having a direct impact in strengthening the independence of the courts it is also important that the judiciary have some degree of control over its own budget.

⁷⁰Organizational study of Albanian Judicial System as available at: <http://ipls.org/services/judicial/j2.html>, last visited 10.03.2008

International standards call for the State to provide adequate resources to enable the judiciary to properly perform its functions⁷¹.

If the courts' budgets are controlled exclusively by the executive and legislative power, the independence of the judiciary can be seriously jeopardized. The executive could direct how the court spends its money and might even deny funding unless certain political mandates are respected and followed. Therefore judges can be discouraged and reluctant to rule independently as they see fit for something that the branches which are responsible for its material well being might disagree with.⁷²

As Justice R.D. Nicholson of Australia has said *“the preparation of judicial estimates by anyone not acting under the direction of the Judiciary and the exercise of control by the Government over the way in which the Courts expend the funds granted to them necessarily poses a potential threat to Judicial Independence.”*⁷³

Clear constitutional provisions ensuring the financial autonomy of the judiciary can be found in both constitutions, the one of Bulgaria and Albania.⁷⁴ Also detailed legal provisions are put in place in the legal system of the two countries to provide the judiciary with a meaningful input to influence the budgeting process and to control the amount of money allocated to it in order to limit the executive ability to restrict judicial independence.

⁷¹ UN Basic principle, 7, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 . See full text of the Principles at http://www.unhchr.ch/html/menu3/b/h_comp50.htm , last visited 10.03.2008

⁷² CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 46

⁷³ Nicholson R.D, Judicial Independence and Accountability: Can they Co-exist, 1993 Australia Law Journal, 404.

⁷⁴ Article 117(3), Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007 as available at <http://www.parliament.bg/?page=const&lng=en>, last visited 12.03.2008 ; article 144 of the Albanian Constitution approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 12.03.2008

Bulgaria places the authority of preparing the judicial budget in the hands of the MoJ and of the SJC. The MoJ has the competence to propose a draft budget for the judiciary and submit it for consideration to the SJC.⁷⁵ After the reviewing the budget, SJC submits the revised draft judiciary budget to the Council of Ministers and controls its implementation.⁷⁶ Afterwards the Council of Ministers incorporates the judiciary budget in the annual budget and presents the entire state budget before the National Assembly.⁷⁷ Based on what is stated in Article 130, seems that SJC is vested with the authority to significantly modify and adjust MoJ's budgetary draft in order that the changes properly fits in the budgetary lines of the judiciary. This seen in the light of the Bulgarian Constitutional Court rulings which state that since the budgetary independence of the judiciary is constitutionally guaranteed, excessive authority over the court adopt its budget cannot be placed within the executive branch.⁷⁸

The model adopted by the Albanian system seems to represent more effectively the judiciary's material interests than the Bulgarian approach. In light of this, Albanian experience provide to the Judiciary full responsibility to be a promoter of its own budget, to draft and administer a completely separate budget, intact by participation or pressure by other political branches and once the budget is approved and allocated, the judiciary has the right to exercise control over its expenditures in each court⁷⁹.

⁷⁵ Art 130.a (1), Constitution of Bulgaria, id

⁷⁶ Art. 27(1).8 , Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at:

http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 13.03.2008

⁷⁷ Art 87.2 Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007 as available at <http://www.parliament.bg/?page=const&lng=en>, last visited 12.03.2008

⁷⁸ Decision No. 18 of Dec. 16,1993, SG No. 19 (Mar. 9, 1993); Decision No. 4 of Oct. 7, 2004, SG No. 93 (Oct. 19, 2004), of the Bulgarian Constitutional Court

⁷⁹ Art. 144 Constitution of Albania id ; Art. 18 of Law No. 8436, dated 28.12.1998 "For the Organization of the Judicial Power in The Republic of Albania" published in SG No.33, date 14.01.1999 as available at:

<http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited. 12.03.2008

Albania has established an independent body responsible for proposing the judiciary budget and administers budgetary funds destined for the courts. The Office for the Administration of the Judiciary Budget⁸⁰ is managed by a Director, who is accountable to an Executive Board.⁸¹ The Executive Board is composed of nine members and includes a High Court judge, one MoJ representative, two chief judges from appellate courts, four chief judges from district courts and the Chairman of the High Court who serves as the Chairman of the Board. The representatives are elected during a meeting of all the chief judges for a two-year mandate with the right of reelection.⁸²

Initially, each court is obliged to submit draft proposal budgets to the OAJB, the only court which does not obey to this rule is the Constitutional Court (*which draft its budget independently*) – and afterward is approved – by the Board⁸³. The process of consolidated draft judiciary budget is carried out by the OAJB, once all the individual court budgets are collected and complied under each respective budgetary line. Afterwards, the consolidated budget is submitted to Ministry of Finance.⁸⁴ Later on, the OAJB Board Chairman and OAJB Office Director are invited for a hearing in the Parliamentary Commissions on Legal Issues, Public Administration and Human Rights and on Economy and Finances, in order to defend and advocate for the proposed budget. At the end of this process, the Council of Minister submits for approval to the Assembly the proposed judiciary budget. Once the proposed budget is finally

⁸⁰ Art 2, Law nr. 8363 date 01.07.1998 “On the creation of the office for the administration of the judiciary budget”, Ligji “Per krijimin e zyres se administrimit te buxhetit gjyqesor” published in SG nr.16, date 22.07.1998 as available at:

http://www.qpz.gov.al/results.jsp?simplequerystring=&any_all_exact=all&EQ_DocumentMeta/Numri_i_aktit=8363, last visited 12.03.2008.

⁸¹ Arts. 6, 11, Law “On the creation of the office for the administration of the judiciary budget”, id

⁸² Art 7, Law “On the creation of the office for the administration of the judiciary budget”, id

⁸³ Article 9, Law “On the creation of the office for the administration of the judiciary budget” id ; article 6 of the Law Nr 8577 date 10.02.2000, “For the organization and functioning of the Constitutional Court of Republic of Albania”, published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 12.03.2008

⁸⁴ Art 9 Law “On the creation of the office for the administration of the judiciary budget”, id

approved and allocated, then it is again the time for OAJB to distribute and allocate the portions of the overall budget to individual courts based on annual priorities defined by the Executive Board of OAJB as well as the preliminary needs and budget proposals coming from each court⁸⁵ However as we could observe in the previous paragraphs, in no case the judiciary have prerogative of complete control over the budget proposals for the judiciary since certainly the legislative has the last word in determining the budget.⁸⁶

C. Judicial Salaries

Adequate payment is a necessary safeguard in ensuring the credibility and the honesty of the judges against the risk “*that impoverished judges will be compelled to sell justice to make ends meet*”⁸⁷ In order to avoid the temptation of corruption judges must have a sufficiently high salary which has to be “*commensurate with the dignity of the profession*” -and must- “*ensure that the judge has true economic independence*”.⁸⁸ In addition to that, compensation of judges apart from corresponding to the dignity of their office and responsibilities must also be equivalent and comparable to the salaries of the other public officials on the similar level outside the judiciary. In order to not pose any significant risk to judicial independence the wages of the judges may not

⁸⁵ Art 9 Law “On the creation of the office for the administration of the judiciary budget”, id

⁸⁶ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 47

⁸⁷ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch Ltd, page 49

⁸⁸ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001, Design Layout by Createch Ltd, page 49

be reduced except for disciplinary reasons. Article 138 of the Albanian Constitution states that “...the pay and other benefits of judges cannot be lowered...”⁸⁹.

Judicial Reform Index for Bulgaria 2006 report that judicial salaries and benefits have improved considerably in recent years, usually they are more or less comparable to those of members of Parliament or civil servants in leading positions and are considered adequate and generally satisfactory.⁹⁰ By having a look at the statistics on the wages scale, the monthly wage of the employees in the judiciary, even at the lowest level it is twice bigger in comparison to the monthly wage of a public civil servant.⁹¹ A young freshly appointed judge in Bulgaria gets 732 Leva per month the equivalent of \$ 458 – this based on official resources from the National Institute of Statistics.⁹²

The chairman of the SCC and the SAC receives a salary amounting up to 90 percent of the salary received by the President of the Constitutional Court.⁹³ Whereas the President of the Constitutional Court receives a salary equal to the arithmetic mean between the salary of the President of the Republic and the chairperson of the National Assembly, the other members of the Constitutional Court receive 90% of their chairperson’s compensation.⁹⁴ The compensation of other positions within the judiciary are determined by the SJC.⁹⁵

While Bulgaria has already regulated the salary scheme for the judges, in Albania the situation is still problematic as the judges’ salaries are yet not at the required level though the monthly salary

⁸⁹ Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 13.03.2008

⁹⁰ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 15.03.2008

⁹¹ Art 139(2) the Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at:

http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 14.03.2008

⁹² ABA CEELI, Judicial Reform Index for Bulgaria 2006 id

⁹³ Art.139(1) Judicial System act, id

⁹⁴ Art. 10. Constitutional Court act as available at:

<http://www.legislationline.org/legislation.php?tid=112&lid=2828&less=false>, last visited 14.03.2008

⁹⁵ Art 139(3) of the Judicial system act, id

has been increased several times during the last years. Judges are still complaining that what they are getting per month is not enough and that they need to look for other means and resources in the meantime.⁹⁶ Many judges became discouraged and resigned from their positions, becoming attorneys instead or choose the other way around “*they simply became victims of corruption*”.

While the wages of the High Court judges are sufficiently high, the salaries of the lower court judges are low and not equivalent to similarly situated officials in other branches of government.⁹⁷ A High Court judge receives the same salary as a government minister, and the Chairman receives 20% more than one of the members of his/her court.⁹⁸ A Constitutional Court judge receives an equal payment to that of the president of the High Court; while the salary of the Constitutional Court Chairman is 20% higher than the compensation of a judge of the Constitutional Court.⁹⁹ Being a sensitive issue – the case of the judges’ salary in Albania, EURALIUS, an EU sponsored project has already proposed to the Minister of Justice to review the salary scheme and propose an increase of the salaries’ level, but the Minister was reluctant to it arguing that such fact is not at all going to diminish the level of corruption in the Judicial branch.¹⁰⁰

⁹⁶ ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 15.03.2008

⁹⁷ Judicial reform index for Albania 2006, Id

⁹⁸ Art. 22, Law Nr. 8588, date 15.3.2000 “On the organization and functioning of the High Court of Albania”, published in SG nr.7, date 12.04.2000 available at: <http://www.gjykataelarte.gov.al/english/ligji.htm>, last visited 15.03.2008

⁹⁹ Art. 17, Law Nr 8577 date 10.02.2000, “For the organization and functioning of the Constitutional Court of Republic of Albania”, published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 14.03.2008

¹⁰⁰ ABA CEELI, Judicial Reform Index for Albania 2006 id

III. Judicial office and structural safeguards in Albania and Bulgaria

A. Qualifications and appointment selection process

An important element towards enhancing professionalism among the judiciary and increasing public confidence in its integrity and abilities is that the individuals seeking judgeship must satisfy certain requirements and specified qualifications. The purpose behind these requirements (*is presumed to be hopefully correctly*), have to do with the selection of qualified and skilled judges who are more able than layman to apply and understand the law, to deal with all the challenges and difficulties encountered in the job, to produce fair and reasoned judgments and to be persons with high moral integrity. Putting in place the proper qualifications for judges that will ensure that the he/she is highly qualified and behaves with the dignity of a judge, bare special importance especially when one considers the fact that most of the judges have life tenure or are appointed for a fixed period of time and they are granted functional immunity. Thus it can be extremely difficult to weed out incompetent and dishonest judges that adversely affect the administration of justice except in case of misconduct and intentional crimes. *“Without adequate legal background, training or professional qualifications, it is more likely that judges need to refer to colleagues or bosses, or even to merely flip a coin or to consult spectators in the court room.”*¹⁰¹

In the first years after the fall of communism in Albania previous the adoption of the constitution, in many cases the government appointed as judges persons who had completed only six months of judicial training sessions. At the time it was believed that in order to become a

¹⁰¹ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, pages 23 - 24

judge it is enough to be an Albanian citizen, to have a degree(*not necessarily a law degree*), be older than 22 years old and most importantly “*being politically loyal to the governing party*”.

In Bulgaria in order to meet the qualifications to be a judge an individual must be a Bulgarian citizen, with a degree in law from a higher educational establishment; have completed the required three-month post-graduation training in the judiciary and have acquired a license competence to practice law; have not been convicted for an intentional crime, regardless rehabilitation ; and possess “*the required moral integrity and professional qualities*”, determined in accordance with rules of professional ethics applicable to judges.¹⁰²

In Albania the basic requirements to be eligible for a post of a judge in a first instance court, a court of appeal and the serious crimes court, are almost the same with Bulgaria. The candidate must be an Albanian citizen, possess full legal capacity, hold a law degree, have no criminal record, have a “good reputation,” have been graduated from the Albanian Magistrates’ School and be not less than 25 years of age. Eligible for appointment as a judge can also be persons who have not graduated from the Magistrates’ School if they meet the other requirements defined in the above mentioned paragraph as well as one of the following requirements: had at least 3 years working experience as a professor, as a deputy of the Assembly, as a legal adviser to the Assembly, the President of the Republic, or the Council of Ministers, or as a specialist with the Ministry of Justice, the High Court, or the General Prosecutor’s Office; have been graduated from a qualifying postgraduate legal training program abroad; or worked for at least 5 years as a judge, assistant judge, public prosecutor, advocate, or notary and pass a professional competency

¹⁰² Art 126 Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf , last visited 15.03.2008

examination within six months after appointment to the bench.¹⁰³ However a proposed revision to the Law on the Organization of the Judicial Power, contemplates that all new judges, without exception, would be required to graduate from the MS.¹⁰⁴

In addition the law requires that candidates for judicial positions at courts of appeal must have served not less than 5 years in the first instance courts and demonstrated high ethical, moral and professional standards in the exercise of their duties¹⁰⁵ and judges of the high court not less than 10 years in the bench or alternatively be prominent professional jurists with at least 15 years of experience.¹⁰⁶ Constitutional Court judges are selected from the ranks of high qualified jurists with at least 15 years of professional experience.¹⁰⁷

Apart from the importance of putting in place the necessary qualifications, another issue which bares the same weight is, who is responsible for the appointment selection of judges. In order to minimize the potential risks to judicial independence the procedure regulating the appointment should be transparent and the body responsible for the appointment of judges must be free from political interference eliminating in this way the political flavor of judicial appointments¹⁰⁸. On

¹⁰³ Arts 19, 20 Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in the Republic of Albania” published in SG No.33, date 14.01.1999 as available at:

<http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited. 17.03.2008

¹⁰⁴ ABA CEELI, Judicial Reform Index for Albania 2006 as available at

<http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 17.03.2008

¹⁰⁵ Art 24.1 Law “For the Organization of the Judicial Power in the Republic of Albania”, id

¹⁰⁶ Art 3 Law Nr. 8588, date 15.3.2000 “On the organization and functioning of the High Court of Albania”, published in SG Nr.7, date 12.04.2000 available at: <http://www.gjykataelarte.gov.al/english/ligji.htm>, last visited 17.03.2008

¹⁰⁷ Art. 7.2, Law Nr 8577 date 10.02.2000, “For the organization and functioning of the Constitutional Court of Republic of Albania”, published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 17.03.2008

¹⁰⁸ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 25-26

the other hand “*denying the political branches any say in the selection of judges risks isolating the judiciary from the democratic society which it serves*”¹⁰⁹.

In Bulgaria except judges of the constitutional court and the presidents of the supreme courts¹¹⁰ the principal decision over the appointment of the rest of the judges are taken by the Supreme Judicial Council. The Constitution empowers the SJC to appoint judges and other magistrates, but the Minister of Justice retains the right to make proposals for appointment of the magistrates¹¹¹. Most of the judges are appointed as junior judges elected by way of a national competition which is announced by the SJC and published in the SG, held by a five person committee selected by the SJC. The candidates can challenge the competition outcomes to the SCJ and if they disagree with it can appeal the decision of the SCJ before SCA within 14 days from notification.¹¹²

In comparison to the system in place in 2002 in Bulgaria when the chief judges of the court could pick up any person to become a newly appointed judge based on their preferences or outside political interferences – based on the findings of the Judicial report for Bulgaria in 2006 – the step forward of organizing a national competition for the selection and recruitment process of the judges is seen as very progressive and successfully replacing a pre-2002 process fraught with personal connections and political affiliations.¹¹³ However this system also has its imperfections.

There are some complaints about the competition, concerning the fact that the competition

¹⁰⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 51

¹¹⁰ The presidents of the Supreme courts are appointed by the President of the Republic upon the proposal of the SCJ, art 129(2) Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 17.03.2008

¹¹¹ Arts 129, 130a Constitution of Bulgaria; art 128 Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 17.03.2008

¹¹² Art 127(a), (b), (c) Judicial System act id

¹¹³ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 17.03.2008

concentrates exclusively on academic abilities and offers little or no opportunity to measure other features that characterize and complete the portrait of a judge.¹¹⁴

As in Bulgaria actors of the political branches are involved in the appointment of the Albanian judges of the High courts. In both countries the criteria for appointment to the High Courts are vague and allow political considerations to influence the selection. For example the only qualifications for being eligible to a post in the Constitutional Court of both countries are a minimum of 15 years experience in the legal profession, high moral integrity and high qualifications¹¹⁵.

Judges of the High Court and the Constitutional Court are appointed by the President of the Republic with the consent of the Assembly.¹¹⁶ The other Judges are appointed by the President of the Republic on the proposal of the HCJ.¹¹⁷

Judicial vacancies at the HCJ are made public three times through advertisements in the written and electronic media and by other information means, based on the initiative undertaken by MoJ.¹¹⁸ Following to that, a special commission composed of five members is established after one month in order to assess and evaluate how the applicants met the criteria of performance for

¹¹⁴ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at:

http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 15.03.2008

¹¹⁵ Art. 125.2 Constitution of Albania approved by the Parliament on 21 October 1998, as available at:

<http://www.ipls.org/services/kusht/contents.html>, last visited 16.03.2008; art 147.3 Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 16.03.2007

¹¹⁶ Art 136.1, Constitution of Albania, id

¹¹⁷ Art 136.4, Constitution of Albania, id

¹¹⁸ Art. 28, Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No.9 date 22.04.2002 as available at: <http://www.kld.al/>, last visited 14.03.2008; art. 21 Law No. 8436, dated 28.12.1998 "For the Organization of the Judicial Power in the Republic of Albania" published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited. 15.03.2008

the judgeship and professional skills to become a judge.¹¹⁹ Regardless of what is stated in the law with relation to the professional examination, all the commission is currently doing deals with checking out compliance with legal criteria of selection and appointment.¹²⁰ While the President of the Republic has no right to vote or saying in the process, the candidates are subject to approval by the majority voting of the *HCJ*.¹²¹ According to Judicial Reform Index for Albanian 2006 many interviewees believed that the criteria for judicial appointments are too vague and as a corollary personal connection and political affiliations are emphasized over merits.¹²² Because of personal and political affiliations a particular case happened in Bulgaria back in 2005, when the son of a member of the SJC was appointed as a regional court judge without even going through the competition and later on was promoted to a district court without satisfying any of the requirements for the post as a district court judge, making the SJC the target of general criticism.¹²³

B. Tenure and transfer policy

A fundamental tenet of judicial independence in accordance with international standards¹²⁴, is to provide life tenure for judges until a mandatory retirement age or a fixed period of service which

¹¹⁹ Art. 29, Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No.9 date 22.04.2002 as available at: <http://www.kld.al/>, last visited 17.03.2008.

¹²⁰ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 17.03.2008

¹²¹ Arts. 25.3, 30 Law "On the organization and functioning of the High Council of Justice", id

¹²² Judicial Reform Index for Albania 2006, id

¹²³ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 15.03.2008

¹²⁴ UN Basic principles 11, 12, see full text of the Principles at http://www.unhchr.ch/html/menu3/b/h_comp50.htm, last visited 18.03.2008

must not correspond to the political election cycle. The judge cannot be independent if he has a sword of Damocles suspended above his head.¹²⁵ Judges might be discouraged to rule in a certain manner if they feel that their future career is threatened by a political actor showing their allegiance and loyalty¹²⁶. To guard against this and to cloth judges with sufficient protection, proper safeguards should be put in place to ensure irremovable status to judges until they reach a mandatory retirement age or their fixed term of office ends. After obtaining irremovability judges cannot be removed of office, except for disciplinary sanctions and other circumstances foreseen in the law. At the same time, granting irremovable status to judges could make it more difficult to remove incompetent or corrupt judges.

Article 138 of the Albanian Constitution declares “*The time a judge stays on duty cannot be limited*”. Judges of first instance courts and courts of appeal are granted irremovability upon appointment until they resign, are removed for a cause, or reach the retirement age of 65.¹²⁷ Judges of the serious crimes, Constitutional Court and the High Court serve for fixed terms of nine years but only judges of the Serious Crimes Court are eligible for reappointment.¹²⁸ However following the end of their service in the bench of the above mentioned courts, a high court judge may be appointed to a court of appeal and the judges of the serious courts have the

¹²⁵ Opinion no. 246/2003, European Commission for democracy through law (Venice Commission) Comments on constitutional amendments reforming the judicial system in Bulgaria, by Mr Orlando Afonso Venice commission as available at: [http://www.venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)060-e.asp), last visited 18.03.2008

¹²⁶ CEU, Monitoring the EU Accession Process, Judicial Independence Printed in Budapest, Hungary, September 2001, Design Layout by creatch ltd, page 54.

¹²⁷ Art. 138 Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 18.03.2008; arts 25, 27, Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in The Republic of Albania” published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited on 18.03.2008

¹²⁸ Arts, 125.2, 136.3 Constitution of Albania, id ; art 7.2 Law Nr 8577 date 10.02.2000, “For the organization and functioning of the Constitutional Court of Republic of Albania”, published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 14.03.2008; Law nr. 9110, dated 24 July 2003 “ On the organization and functioning of the courts for serious crimes” art, 3.1, 3.3, published in SG Nr.78, date 24.07.2003 as available at: <http://www.legislationline.org/upload/legislations/28/24/7ff787eb215f303b41e3dc0edd14.pdf>, last visited 14.03.2008

right to be appointed to their previous judicial office or to vacancies on other courts, receiving priority over other candidates.¹²⁹ A Constitutional Court judge upon completing his/her term in the Constitutional Court has the right to be appointed “*in another equal or similar duty*”¹³⁰. All the judges in exception of the judges of the Constitutional Court must retire at the age of 65.¹³¹ The retirement age for a Constitutional Court judges is 70.¹³²

Unlike the Albanian judges the Bulgarian judge earns irremovable status only after a completion of a probationary period of five years by a decision of the SCJ.¹³³ Similarly to Albania the Constitutional Court judges, in contrast to other members of the judiciary, they are elected for fixed nine year terms without the right of reappointment.¹³⁴

Before the completion of the five year term, the chairman of the court or the interested judge must submit a proposal in writing which include a professional information about the judge following the SJC’s format. The SJC’s Proposals and Performance Appraisal Commission is responsible for carrying out performance appraisal of the judge and submits it to the SJC within 14 days of the submission of the respective proposal. The judge has the right to be heard before the SCJ and to file objections if the appraisal of the Commission is negative and he or she disagrees with it. Decision on the proposal shall be adopted by majority vote of the total number of the SJC members by secret ballot within seven days of submission.¹³⁵

¹²⁹ Art. 3.5, Law “On the organization and functioning of the courts for serious crimes, id; art. 25 Law No. 8588, date 15.3.2000 “On the organization and functioning of the High Court of the Republic of Albania, id

¹³⁰ Art. 18, Law, “On the organization and functioning of the Constitutional Court of Republic of Albania” Id

¹³¹ Art. 25, Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in the Republic of Albania” id

¹³² Art. 127 Constitution of Albania approved by the Parliament on 21 October 1998, id.

¹³³ Article 129 of the Constitution of the Bulgarian Constitution Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at <http://www.parliament.bg/?page=const&lng=en> last visited 12.03.2008

¹³⁴ Art 148 of Constitution of Bulgaria, id

¹³⁵ Art 30 b, (1), (3), (5),(6), (7) Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf

On one hand probationary period can pose a real problem for judicial independence because judges can believe and feel that they are dependent on the officials that determine their tenure and therefore are reluctant to rule against their wishes. But on the other hand it can be a necessary measure to get rid of inefficient judges. This means that the benefits of having competent and qualified judges must be balanced against the risk for harm to judicial independence.¹³⁶ It is important to stress that the system should aim at offering judges who are accountable for delivering judgments and not put in place restriction factors with the reasoning that judges cannot handle a broad grant of independence¹³⁷.

In relation to the previous comment, the model adopted by Albania which aims at ensuring judicial independence and don't expose it at risks by further enhancing the professional capacities of the judges, since the early stages and by also purging the issue of judicial responsibility, sensitive for the new judges, may be more effective.

Following the selection based on the results of a written exam and the completion of three-year initial training course at the Magistrate School, judges gain irremovability upon appointment. Three years of training consist of the first year of theoretical courses with various subjects of the law; the second year of practical training under the care of a pedagogue of the Magistrate School and under the direction of a judge with high qualifications; and the final year of active practice considered as period of professional internship, where the students engage in practice at courts and deal with several complex judicial cases under the supervision of higher judges. During the

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¹³⁶ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd. page 52

¹³⁷ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd. page 52

practical internship period , the candidates enjoy the same rights and have the same obligations as judges.¹³⁸

The security offered by tenure can lose importance if, the power to transfer judges is abused and used inappropriately to intimidate judges to rule in a certain way. Thus, it is important that sufficient safeguards be put into place to ensure that transfer policy is insulated from political considerations and its not used to exert political pressure, offering the possibility to use it as tool to punish or reward judges based on the substance of their rulings.¹³⁹

In Both Albanian and Bulgaria judges may not be transferred permanently from one court to another during their term in office without their consent; except when the needs of the reorganization of the judicial system dictate this or its imposed as a disciplinary measure by the judicial councils of the two States.¹⁴⁰

C. Promotion

Another safeguard against incursions to judicial independence is that judges should be promoted through a transparent and detailed procedure which is based on clear and precise criteria recognized by international standards¹⁴¹, such as experience, ability and integrity, making the

¹³⁸ Arts 14(a), 14(c), 21 Law no. 9414 of May 20, 2005 "On the Magistrate' School of the Republic of Albania", published in SG nr.45, date 14.06.2005 as available at: <http://www.magjistratura.edu.al/index.php?fq=info&metod=shfaqkat&katID=234&gj=ang> , last visited 19.03.2008.

¹³⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 52

¹⁴⁰ Art. 27(4), 169 (1) 169(5), 130 Of the Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 19.03.2008; Article 147.5 of the Albanian Constitution approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 19.03.2008

¹⁴¹ Un basic principles 13 as available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm, last visited 07.03.2008; Universal Charter of the Judges, Art 9 as available at: <http://www.iaj-uim.org/ENG/07.html> last visited 18.03.2008

process fair and not subject to abuse or any politically biased decisions. If specific and detailed norms regulating the promotion of judges are not in place, judges can be influenced and prone to rule in a manner which pleases the officials who has the responsibility to decide on their promotion.¹⁴²

Article 129(1) of the Bulgarian constitution and arts 27(1), 27(4) of the Judicial System Act confer on the Supreme Judicial Council (SJC) the authority to promote judges. In Albania the responsibility for the appointment of the Chief judges and deputy chief judges of the district courts, courts of appeal, and serious crimes courts lays on the HCJ.¹⁴³

This body has also the authority to transfer a judge to a court of the same level in a preferred location.¹⁴⁴ The HCJ enjoys the power make recommendations for the promotion of sitting judges to the courts of appeal and the serious crimes courts to the President of the Republic.¹⁴⁵

In order to satisfy the requirements to be promoted in these posts the judge must have 5 years of judicial experience in the lower courts, as well as demonstrated “high ethical, moral, and professional standards” in the exercise of their duties¹⁴⁶. It is HCJ’s discretion to assess how these requirements are satisfied.

¹⁴² CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001.

Design Layout by Createch Ltd, pages 57- 58

¹⁴³ Art 2(e) of Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, “On some amendments and supplements to Law No. 8811, dated 17.05.2001, “On the organization and functioning of the High Council of Justice”, published in SG No.9 date 22.04.2002 as available at: <http://www.kld.al/>, last visited 19.03.2008, Art 24 paragraf 2 of the Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in The Republic of Albania” published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited on 19.03.2008

¹⁴⁴ Art 2 c to Law No. 8811, dated 17.05.2001, “On the organization and functioning of the High Council of Justice

¹⁴⁵ Art. 136.4 Constitution of Albania; art. 3.2 Law “ On the organization and functioning of the serious crimes courts” (Law No. 9110 dated Jul. 24, 2003), SG nr.78, date 22.09.2003 as available at <http://www.legislationline.org/upload/legislations/28/24/7ff787eb215f303b41e3dc0edd14.pdf>, last visited 19.03.2008.

¹⁴⁶ Arts. 24 Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in The Republic of Albania” published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited on 19.03.2008

In the case of Bulgaria, the right to make recommendations for the career advancement of the judges to each court and appointment to the position of president of the lower courts belongs to the Minister of Justice, to at least one-fifth of the members of the SJC, to the chairman of the court the judge belongs and in case of appointments of president of court also to the president of the immediate higher court, who must submit their proposal to the Proposals and Performance Appraisal Commission of the SJC for an evaluation.¹⁴⁷

In assessing the performance of judges proposed for promotion, the commission must base its decision, in part: on the opinion of the relevant court president; on the number, type, complexity and seriousness of files and cases examined; on compliance with statutory and non-binding time periods; number of acts upheld and repealed and awards and sanctions within the period under examination.¹⁴⁸

The Proposals and Performance Appraisal Commission carries out performance appraisal and submit the results for consideration to the Supreme Judicial Council within 14 days of submission of the respective proposal¹⁴⁹. Within 1 month of the receipt of a request for an evaluation of the proposed promotion, the SCJ shall rule on a negative performance appraisal, and the judge being evaluated has the opportunity to be heard by the SJC and to provide written objections. Decisions on the proposals are taken with a majority of more than half of the total number of Supreme Judicial Council members, by secret ballot.¹⁵⁰

Although the process is based in clear and detailed criteria court observers contend that the process used to evaluate the performance of a judge for promotion is more focused on quantity than quality with a strong emphasize to numbers and not to the quality of the decision of judges

¹⁴⁷ Arts. 30(1), 30(2), 30(4), 30b(1). 30(1), 30(2), 30(4), 30a(1) Of the Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 15.03.2008

¹⁴⁸ Art 30b (4), Judicial System Act id

¹⁴⁹ Art 30b (5) Judicial System Act id

¹⁵⁰ Art 30b (6), (7), (8), Judicial System Act id

and other important features such as objectivity, neutrality, honesty, moral integrity, and the judge's professional experience.¹⁵¹ Basing the process only on numbers and statistics can have a deleterious effect on the *quality* of the decisions of the courts and their contribution to the goals of a just society.¹⁵²

In Albania as reported by Judicial Reform Index 2006 - *"The promotion process is more reliant on personal connections, rather than on individual merits and clear and objective criteria"*.¹⁵³ The HCJ establishes the criteria for the evaluation of judges, controls and guarantees the process of evaluation and reviews complaints of judges regarding their evaluation.¹⁵⁴

The evaluation methodology leave to much room for discretion to the HCJ since its not based in detailed and precise criteria and therefore cannot properly differentiate among candidates and assess their performance. Most of the interviews within the judiciary contended that concrete and objective criteria , for assessing the performance of the judge, should be defined in the law. Without such definition, lack of sufficient clarity and precision of objective criteria the process is open to abuse¹⁵⁵.

In an attempt to resolve these problems the HCJ with the assistance of the Council of Europe, adopted a revised evaluation system in 2005. This system was introduced as a pilot program in certain courts. According to this system the chief judge maintains a file and records information about judge's professional performance which is then revised by the HCJ Inspectorate. Finally,

¹⁵¹ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 19.03.2008

¹⁵² ABA CEELI, Judicial Reform Index for Bulgaria 2006 id

¹⁵³ ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 19.03.2008

¹⁵⁴ Art 2dh, Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No.9 date 22.04.2002 as available at: <http://www.kld.al/>, last visited 19.03.2008

¹⁵⁵ ABA CEELI, Judicial Reform Index for Albania 2006 id

the HCJ Inspectorate prepares an evaluation and submits it for review to the chief judge of the respective court, the chief judge of the Court of Appeal, and the judge that is being evaluated. If a judge disagrees with the evaluation, he/she can appeal to the HCJ.¹⁵⁶

D Judicial Immunity

Judges cannot take responsibility for actions performed in their official capacity but should not enjoy and benefit from a general immunity. The immunity the judges enjoy should be limited and extended only to protection from civil and criminal liability relating to the exercise in good faith of their functions in order to struck the proper balance between accountability and independence. Judicial immunity is intended to protect a judge from operating under conscious or even sub-conscious threat of a financial penalty or even worse fear of imprisonment, which may affect his independent judgment.¹⁵⁷

Since judicial decisions are subject to examination by the appellate court and as long as the conditions of independence and impartiality vis-à-vis the decision taken by the judge are satisfied, they should not bear any responsibility for judicial errors, either in respect of jurisdiction, court procedure, application of the law or in evaluating the evidence. Other judicial deficiencies that do not fall under the above categories (*including excessive delay*) should not constitute grounds for judges' responsibilities, but at most can lead to a claim by the frustrated litigant against the State.¹⁵⁸

¹⁵⁶ ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 20.03.2008

¹⁵⁷ Opinion no. 246/2003, European Commission for democracy through law (Venice Commission) Comments on constitutional amendments reforming the judicial system in Bulgaria by Mr Orlando Afonso, Venice commission as available at: [http://www.venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)060-e.asp), last visited 22.03.2008

¹⁵⁸ Opinion no. 246/2003, id

Previous to the amendments made among others to Article 132 of the Bulgarian constitution judges enjoyed the same immunity as the members of the National Assembly as defined in Articles 69 and 70 of the Constitution. The amendment article states that “ *When exercising the judicial function, the judges, prosecutors and investigating magistrates shall bear no civil or criminal liability for their official actions or for the acts rendered by them, except where the act performed constitutes an indictable intentional offence*” .¹⁵⁹

First of all, it is to be clarified that judges are still immune and enjoy absolute freedom from civil or criminal liability for unintentional failings in respect of actions they perform or rulings they deliver in the course of performing their official duties, but cannot claim immunity from ordinary criminal process when during the exercise of their functions commit what would in any circumstance constitute an indictable intentional offence. It is clear that the aim of these amendments was on one hand to preserve the “*irresponsibility*” or functional immunity of judges for actions they perform in their official capacity but on the other hand limited an overly broad and outright immunity¹⁶⁰.

In Albania, the immunity of the judges for actions performed during the exercise of their functions is enshrined in the constitution and the relevant law. An accusation may not be brought against a judge without the permission of the HCJ.¹⁶¹ Judges bear no civil liability related to the

¹⁵⁹ Art 132, Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006 , SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 22.03.2008

¹⁶⁰ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 22.03.2008

¹⁶¹ Art. 137.3, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 08.03.2008; art. 26, Law No. 8436, dated 28.12.1998 “For the Organization of the Judicial Power in The Republic of Albania” published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html> , last visited. 12.03.2008

fulfillment of their professional duties, except if a special law expressly so provides.¹⁶² In addition, a judge may be detained or arrested only if apprehended in the course of committing a crime or immediately after its commission. But if the High Council of Justice does not consent within 24 hours to the sending of the arrested judge before a court, the competent organ is obliged to release him.¹⁶³ The Judges of the high court may be criminally prosecuted only with the approval of the Assembly.¹⁶⁴ while the judges of the constitutional court cannot be criminally prosecuted without the consent of the Constitutional Court.¹⁶⁵

As lower court judges, high court and constitutional court judges may be arrested in the course of committing a crime or immediately thereafter. The competent organ immediately notifies the Constitutional Court, whose consent is required prior to the judge's initial appearance before a criminal tribunal. If the consent is not given within 24 hours, the judge must be released.¹⁶⁶

The Criminal Code provisions including those against corruption of public officials will apply immediately after the immunity of a judge has been lifted by the competent body.

Under article 315 of the Criminal Code a judge can be criminally prosecuted for knowingly issuing an unfair final decision.¹⁶⁷ The provision is ambiguous and can leave room for interpretation, because it makes very difficult to distinguish between what constitute an unfair

¹⁶² Art. 37 Law "For the Organization of the Judicial Power in The Republic of Albania" id.

¹⁶³ Art. 137. Constitution of Albania id

¹⁶⁴ Art 137.1 Constitution of Albania id

¹⁶⁵ Art. 126 Constitution of Albania id

¹⁶⁶ Art. 126 ,137.2 Constitution of Albania ; art. 16.2 L aw Nr 8577 date 10.02.2000, "For the organization and functioning of the Constitutional Court of Republic of Albania", published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 14.03.2008.

¹⁶⁷ Law No. 7895, date 27 January, 1995, amended by Law No. 8204, date 10 April 1997, amended by Law No. 8279, date 15 January 1998, amended by Law No. 8733, date 24 January 2001 CRIMINAL CODE OF THE REPUBLIC OF ALBANIA as available at: <http://www.legislationline.org/upload/legislations/0f/55/d46a10bcf55b80aae189eb6840b4.htm>, last visited 22.03.2008

decision and what constitute an unintentional failing or judicial error and its application is limited since the provision requires the decision to have been knowingly.

In 2004, a former first instance court judge, Elvis Kotini, was unsuccessfully prosecuted under this provision. He was accused and convicted for judicial errors, including a mathematical miscalculation of pretrial detention, immediately after the HCJ had disciplined and as a result dismissed him from office. After Mr. Kotini's appeal, the High Court repealed his conviction on grounds that his decision were intermediate and not a final one as required by the statute. The High Court failed to provide an interpretation of the above mention article on what constitute an unfair decision and define the distinction between a judicial error resulting in dismissal and one meriting criminal charges.¹⁶⁸

E. Discipline and removal of judges

As we already mentioned in the above sub-chapter an important element of the principle of independence is the non-responsibility of the judges for their actions during the exercise of their official duties. The trust conferred and the independence granted by society upon judges in order to secure impartial decisions, have to be used responsibly, and not as a license.¹⁶⁹ In order to prevent that this phenomena happen (*the independence is used as a license*), accountability requires that there should be some form of mechanisms holding judges responsible and even

¹⁶⁸ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 08.03.2008

¹⁶⁹ CEU, Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd., page 52

removing them for office in cases where the behavior of the judge seriously compromises the dignity of judicial office. In addition the body entrusted for the discipline and removal of judges must be free from political pressure and exercise its power based on actual facts and specific and detailed rules which lay out precisely the grounds for disciplinary action, through a process that is fair, transparent, and impartial, rather than through a closed process that is based on political affiliation and personal connections. As the Deputy Director, International Programs, National Center for State Courts, Heike Gramckow said “A well-designed, transparent disciplinary process reduces the vulnerability to abuses that affect judicial independence.”¹⁷⁰

In both Albania and Bulgaria, the judicial councils are responsible for the removal and discipline of the judges of lower courts. The removal of the judge is limited on ground as: the commission of a criminal offense; mental or physical inability to perform their duties (*in case of Bulgaria for more than a year*); acts that seriously discredit the position and image of a judge and undermines the prestige of the judiciary and infringement of their obligations.¹⁷¹ More detailed and specific definition in the legislative acts to undefined and ambiguous phrases like for example “acts that seriously discredit the position and image of a judge” or “actions damaging the prestige of the judiciary” are necessary in order to prevent the misuse and not leave too much room for maneuver to actors who want to punish judges for personal or political reasons.

¹⁷⁰ INTERNATIONAL TRENDS—STRENGTHENING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY Heike Gramckow Deputy Director, International Programs, National Center for State Courts as available at: <http://www.ncsconline.org/WC/Publications/Trends/2005/JudIndIntlTrendsTrends2005.pdf>.

¹⁷¹ Art 147.6, Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 23.03.2008; art 129.(3), 3,4,5 of the Bulgarian Constitution Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at <http://www.parliament.bg/?page=const&lng=en> last visited 23.03.2008

In Bulgaria the right to make proposals for a disciplinary sanction against a judge belongs to the applicable court president, the Minister of Justice or one-fifth of the members of the SJC.¹⁷²

For purposes of hearing these proposals, the SJC creates a standing commission of seven SJC members to which the proposal must be submitted in writing and supported by relevant documents and evidence. The Proposal and Performance Appraisal Commission prepares a recommendation and reasoned opinion and submits it to the SJC within 14 days of the date such proposals, were lodged. The SJC then take a decision on the proposals with a majority of more than half of the total number of Supreme Judicial Council members, by secret ballot, not earlier, however, than 7 days of their submission.¹⁷³ Any interested party has the right to appeal the SJC's decision to the SAC within 14 days of notification.¹⁷⁴

Unlike Bulgaria, in Albania the Minister of Justice has the prerogative of initiating a disciplinary proceeding against a judge.¹⁷⁵ This can be seen as a threat to judicial independence. First of all granting only to the Minister of Justice the exclusive competence to make a proposal for a disciplinary sanction against a judge increases the potential for inappropriate incentives and influence and can be used as means to punish or reward judges based on their rulings. Since the HCJ and other actors within the judiciary do not enjoy the right to make a disciplinary proposal and the Minister is the only one who can initiate the proceeding, judges who follow the political line of the government and are under his protection can be considered untouchable even if they

¹⁷² Art. 172 Of the Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at:

http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited 23.03.2008

¹⁷³ Arts 30a.1, 30a.2, 30a.3, 30a.11, 30a.12 Judicial System Act id

¹⁷⁴ Art 34.1 Judicial System Act_id

¹⁷⁵ Art. 44 of Law No. 8436, dated 28.12.1998 "For the Organization of the Judicial Power in The Republic of Albania" published in SG No.33, date 14.01.1999 as available at:

<http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited. 23.03.2008 ; and art. 31 of Law No. 8811, dated 17.05.2001, amended by Law No. 9448, dated 05.12.2005, "On some amendments and supplements to Law No. 8811, dated 17.05.2001, "On the organization and functioning of the High Council of Justice", published in SG No 99 date 29.12.2000, as available at: <http://www.kld.al/>, last visited 23.03.2008

breach their obligations and the law. The Minister has no right to vote in discipline cases¹⁷⁶, however he/she is allowed to participate in the discussion and express his/her opinion.

A very controversial matter, during 2007, became in Albania the attempt by the Minister of Justice to dismiss judge Artan Gjermeni on the grounds that he had delivered an unlawful decision. The request of the Minister of Justice was turned down by the High Council of Justice on the grounds that according to the Constitution of Albania the judges are independent and subject only to the Constitution and the laws, and that the executive branch is not entitled to argue about the lawfulness of a judicial decision and even more to request dismissing a judge on these grounds.¹⁷⁷ The Albanian Constitutional Court responded to these concerns by issuing 3 decisions which limited the powers of MoJ and HCJ from examining complaints based on the quality of judicial decisions, unless it pertains to an ethical violation arguing that a final decision cannot be the basis for disciplining a judge and that only a higher court has the authority to review a lower court's reasoning.¹⁷⁸

As noted above according to the paragraph 6 of Article 147 of the Albanian Constitution “a judge may be removed from office by the High Council of Justice for commission of a crime, mental or physical incapacity, acts and behavior that seriously discredit the position and image of a judge, or professional insufficiency.” In the above-mentioned case, the High Council of Justice found that the allegations of the Minister of Justice did not fall under any of the reasons for dismissal as mentioned in Article 147. The purpose of this action taken by the Minister of Justice

¹⁷⁶ Art. 25.3 law “On the organization and functioning of the High Council of Justice”, id

¹⁷⁷ Decision of High Council of Justice Nr. 212, datë 22.05.2007 as available at: <http://www.kld.al/>, last visited 16.03.2008

¹⁷⁸ See Decision No. 29 (April 30, 2001) as available at: <http://www.gjk.gov.al/vendimi01.html#11>, last visited ; Decision No. 11 (April 2, 2003) as available at: <http://www.gjk.gov.al/vendimi03.html#11>, last visited ; and Decision No. 17 (Nov. 12, 2004) as available at: [http://www.gjk.gov.al/vendimi04.html#Vendimi%20nr.17,%20datë%2012.11.2004%20\(V%20-%2017/04\)](http://www.gjk.gov.al/vendimi04.html#Vendimi%20nr.17,%20datë%2012.11.2004%20(V%20-%2017/04)), last visited 17.03.2008.

was political and aiming at dismissing this judge because he was also member of the High Council of Justice. With the attempted dismissal of Judge Gjermeni the Minister of Justice was hoping to change the majority of the High Council of Justice members and try to put this institution under the control of the majority in the parliament.

The disciplinary procedure consist in the Minister of Justice submitting a request for disciplinary proceedings, which is recorded in the Register of Disciplinary Proceedings.¹⁷⁹ After the filing of the request the full materials shall be made available to the judge ten days prior to the hearing. During the hearing, the judge under proceeding has the right to defend himself personally or by means of counsel.¹⁸⁰

The review of disciplinary proceedings starts by listening to the pleadings of the Minister of Justice on the causes for the proceedings, followed by a response from the judge or his/her representative. HCJ members then might ask questions to the judge being proceeded in order to clarify issues that need clarification.¹⁸¹ After the final discussions, the High Council of Justice, starts the process of voting on the disciplinary measure proposed by the Minister of Justice¹⁸². The High Council of Justice takes the decision with a majority of votes of the members present in the meeting through an open voting system. If there is a tie vote, the proposal of the Minister of Justice for the disciplinary measure is rejected.¹⁸³ The HCJ is under the obligation to deliver a

¹⁷⁹ **Arts 1, 3 Regulation of the disciplinary proceedings against judges (Decision no. 137, dated 21.02.2003) as available at: <http://www.kld.al/>, last visited 23.03.2008**

¹⁸⁰ Art 44 Law No. 8436, dated 28.12.1998 "For the Organization of the Judicial Power in The Republic of Albania" published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>, last visited 23.03.2008

¹⁸¹ Art 8 Regulation of the disciplinary proceedings against judges (Decision no. 137, dated 21.02.2003) as available at: <http://www.kld.al/>, last visited 17.03.2008

¹⁸² Art 9, Regulation of the disciplinary proceedings against judges, id

¹⁸³ Art 10.1, Regulation of the disciplinary proceedings against judges, id

reasoned decision.¹⁸⁴ In general the grounds determining what constitutes a disciplinary offence are quite specific.

The sanctions applied to judges who are found guilty for disciplinary violations are : reprimand; reprimand with warning; suspension from office and transfer to a lower position within same court for a period of 6 months to 1 year; or transfer to another court of the same level or lower level.¹⁸⁵

As noted by Judicial Reform Index for Albania 2006 , the number of instances of dismissed judges has steadily declined over the years.¹⁸⁶ The decreased number of dismissed judges, while on one hand is encouraging from the point of view of judicial independence, on the other hand are not satisfactory for the community (public) because it shows absence of self-criticism and self-regulation from the judiciary as a whole and specifically from the HCJ. It may be concluded that HCJ has not taken this process seriously and instead of addressing the most blatant and/or systematic problems, is providing a shield for fellow judges. This has a damaging effect because weakens public trust and encourages the other branches of the government to attack the judiciary.

Certainly the establishment of binding codes of judicial ethics, regulating the behavior of judges, with detailed rules for disciplinary action can guarantee for a well regulated and fair disciplinary process and can eliminate the existing problems.

¹⁸⁴ Art 11.4 , Regulation of the disciplinary proceedings against judges, id

¹⁸⁵ Art. 42, Law “On the organization of judicial power in Albania” published in SG No.33, date 14.01.1999 as available at: <http://www.law.nyu.edu/eecr/bycountryrefs/albaniaOrganizationJudicial.html>
Last visited, 23.03.2008.

¹⁸⁶ ABA CEELI, Judicial Reform Index for Albania 2006 as available at:
<http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf> , last visited 23.03.2008

Bulgaria has established an enforceable judicial code of ethics which was adopted by the Union of judges and approved by the Supreme Judicial council in 2004.¹⁸⁷ The code is binding and constitutes a disciplinary ground “*breach of professional ethics*” provided in art.168(1) the violation of which imposes disciplinary penalties provided in art. 170¹⁸⁸. Unlike Bulgaria the Code of Judicial Ethics established by Albanian is not binding and do not necessarily create grounds for disciplinary proceedings. However, the HCJ has referred often to the code in its decision and the recently the code is gaining greater recognition and effect among the judiciary.¹⁸⁹

Finally in order to increase the independence of the judges and at the same time to ensure accountability the aim is to create a transparent process of disciplinary procedure accessible to public scrutiny, which will secure that the corruption and misbehavior of bad judges would not be covered up behind closed judicial doors.¹⁹⁰

¹⁸⁷ ABA CEELI, Judicial Reform Index for Bulgaria 2004 as available at: http://bulgaria.usaid.gov/37/news_item.html, last visited 23.03.2008

¹⁸⁸ Judicial System act_Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: http://www.cityconsultants.org/LEGISLATION/Judicial_System_Act.pdf, last visited, 23.03.2008

¹⁸⁹ ABA CEELI, Judicial Reform Index for Albania 2006 as available at: <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 15.03.2008

¹⁹⁰ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 28

IV. Accountability in Bulgaria and Albania

A. Judicial accountability and transparency

As I mentioned in the previous chapters the independence of the judiciary is crucial to the judiciary's legitimacy as a guarantor of a fair trial and a prerequisite to the rule of law.¹⁹¹ However, the importance of an independent judiciary should not be overemphasized¹⁹² and cannot be extended beyond the limits of judges' core decision making independence. Judges should be aware that the independence conferred upon them by society cannot be used as means in their benefit but as a guarantee of those who seek and expect justice.¹⁹³

As Shimon Shetreet stated in his classic work *Judges on trial*: *"It is not the confidence or perceptions of the judges that matters. The right to an independent tribunal is the right of the consumers of justice. It is the protective right of all human rights. It is neither a right nor a privilege of the judges. This must be made clear to judges. I have often heard judges asserting that they are independent and impartial. It is how the public perceives their performance and conduct that matters. Judges must remember that public confidence in the system is the ultimate safeguard of their independence"*.¹⁹⁴ For this reason, judges need to be accountable to society

¹⁹¹ Opinion no. 246/2003, European Commission for democracy through law (Venice Commission) Comments on constitutional amendments reforming the judicial system in Bulgaria by Mr. Orlando Afonso, Venice commission as available at: [http://www.venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)060-e.asp), last visited 23.03.2008.

¹⁹² Global corruption report finds corruption in Judicial Systems as available at http://www.humanrights-geneva.info/article.php3?id_article=1729, last visited 23.03.2008

¹⁹³ Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch ltd, page 18.

¹⁹⁴ Dato' Param Cumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers, Tension between judicial independence and judicial accountability as available at: <http://www.article2.org/mainfile.php/0205/104/>, last visited at 22.03.2008

which they serve and mechanisms must be in place to ensure that judges do not abuse (*misuse*) with their independence and that the judiciary properly explain its operations¹⁹⁵

Judicial accountability is different from the accountability of the other two branches because of the peculiar nature of the independence and impartiality the judges must have and show. Judges are accountable to the extent of deciding the cases fairly, impartially, with reasons for their decisions and open to the public eye.¹⁹⁶

There is a strong linkage between accountability and transparency. The administration of the judiciary which include, selection and appointment of judges, evaluation, promotion, removal and discipline process, the allocation of court funds, the reasoning decisions as well as the assignment of cases must be transparent and regularized so that the outside world can clearly see what is going on behind the closed doors of the judiciary¹⁹⁷. *“The more transparent and accessible is the process the more accountable the judiciary becomes”*.¹⁹⁸

Judicial accountability becomes a very discussed issue where judicial corruption is a concern and there is a wide public perception that it exist among judges. Since judges are the public authority entrusted with the sacred duty of ultimately resolving conflicts and the protecting the rights and freedoms provided in the law¹⁹⁹ public perception in their independence and impartiality is very important .

¹⁹⁵ Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd, page 18.

¹⁹⁶ Dato' Param Kumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers Tension between judicial independence and judicial accountability as available at: <http://www.article2.org/mainfile.php/0205/104/> , last visited 23.03.2008

¹⁹⁷ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 28

¹⁹⁸ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 28

¹⁹⁹ Ernal Nazifi, The corruption in the judiciary; its spread, forms and the factors that help it, as available at: <http://www.10iacc.org/download/w1-07.pdf>, last visited at 24.03.2008

In both countries, but especially in Albania corruption is a significant problem and is widespread among the ranks of the judges. Public perception about corruption in the judiciary is very high as well . As stated in the survey of 2005 of CASALS & ASSOCIATES on Corruption in Albania: *“the judiciary is frequently ranked among the most corrupt institution in the country together with parliamentarians, customs and tax officials and Courts were also perceived as the least transparent of all public sector institutions”*.²⁰⁰ Corruption seems to be so endemic that surprisingly, in the same survey over one-half (53%) of judges themselves admitted that corruption is a serious problem. and a considerable percentage (51 %) accepted the fact that lawyers and parties approach them and offer bribes to them outside of court venues.²⁰¹

Negative perceptions about the judiciary also exist among the Bulgarian public . The 2006 CSD Study found that 59.3% of people surveyed in November 2005 think that nearly all or most of the judges are corrupted and not impartial.²⁰²

The trust and the confidence of Albanian and Bulgarian citizens in the judiciary is very low, as indicated by several opinion polls conducted in the two countries which revealed the fact that only a small percentage of the people(37% in case of Albania, and 12 percent among small and medium scale entrepreneur in case of Bulgaria) believe in the courts ability to administer and distribute justice²⁰³

²⁰⁰ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf> , last visited 24.03.2008

²⁰¹ABA CEELI, Judicial Reform Index for Albania 2006, id

²⁰² ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 24.03.2008

²⁰³ ABA CEELI, Judicial Reform Index for Albania 2006, id : Bruno Schönfelder , Judicial Independence in Bulgaria: A Tale of Splendor and Misery, **Published in:** Europe-Asia Studies, Volume 57, Issue 1 January 2005 , Professor Terry Cox - University of Glasgow, UK(eds), Publisher: Routledge, University of Glasgow, page 77

It is clear that based on the public perception the Judiciaries of both countries, suffers from lack of sufficient legitimacy. This goes against the need for the judiciary to be publicly perceived as the appropriate body to determine what is right or wrong.²⁰⁴

On the other hand this results show that corruption especially in Albania is endemic and it is widely believed that is it more important to know or be connected to someone in the system than having the law on your side. This reality and perception has also some roots into the Albanian culture according to which taking care of your own friends and family (*even illegally*) is a socially accepted and sometime even rewarded behavior making judges believe that doing this doesn't affect at all their role as impartial arbiters.

Further more, the mentality of parties and their lawyers to use bribes and connections is deeply entrenched. Public perception in the independence of the judiciary is crucial and the basis for the legality of the judicial branch. A corrupted mentality of judges and public, only undermines the trust of society in the justice system. In addition in contrast of what is firmly established in the Code of Judicial Ethics, ex parte communications between judges and parties, are common in Albania²⁰⁵. Finally the words of Chief Justice Verma of India regarding making the judiciary more accountable should be constant reminders to judges: *"Since we are the ones laying down the rules of behavior for everyone else, we have to show that the standard of our behavior is at least as high as the highest by which we judge the others. We have to earn that moral authority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics and adhering to them (emphasis added)."*²⁰⁶

²⁰⁴Larkins C., «Judicial Independence and Democratization: A Theoretical and Conceptual Analysis» (1996), 44

²⁰⁵ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf> , last visited 24.03.2008

²⁰⁶ Dato' Param Kumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers Tension between judicial independence and judicial accountability as available at: <http://www.article2.org/mainfile.php/0205/104/> , last visited 24.03.2008

B. Public and media access

Monitoring and criticizing on judicial administration, including discipline of the judges, promotion, evaluation, appointment, assignment of the cases, judicial decisions as well as judicial institutions, is an important element of accountability which enables the civil society to call attention for systematic failures of the judiciary, compelling the government to generate a response making the oversight role of the civil society imperative²⁰⁷.

In many cases the judges see the oversight role of the civil society as an intrusion into their independence and they often refuse to provide information about their judicial decisions. However, as long as criticism by the media and public do not encroach upon the fundamental right of the judges to rule independently as they see fit it should not be seen as improper interference.²⁰⁸ What Lord Atkin said on a proper balance of the two competing interests, should be kept in mind by all persons vested with the authority of judge - *“The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men”*.²⁰⁹

²⁰⁷ Global corruption report finds corruption in Judicial Systems as available at http://www.humanrights-geneva.info/article.php3?id_article=1729, last visited 22.03.2008

²⁰⁸ Monitoring the EU accession Process, Judicial Independence, Printed in Budapest, September 2001. Design Layout by Createch Ltd. page 20

²⁰⁹ Dato' Param Kumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers Tension between judicial independence and judicial accountability as available at: <http://www.article2.org/mainfile.php/0205/104/>, last visited at 22.03.2008

Both Albania and Bulgaria has designed a process which enables the public to complain against judges conduct. In Albania the public can file complains in the MOJ and the HCJ

Inspectorates, the office of the President and the Ombudsman office. However, as noted elsewhere in this paper the blurred division of authority of the 2 inspectorates attached to the HCJ and the MOJ, obstruct the efficient and transparent operation of the process. According to statistics provided by the HCJ, the number of complaints it received in 2003 was 391, 538 in 2004, 710 in 2005, and 770 in 2006 and the office of the Advocate of the people received 388 complaints against the judiciary in 2005, up from 252 complaints in 2004. The increased number of complaints shows that the people are well informed that a complain procedure exist, but as JRI 2006 for Albanian shows there's an absence of information about how and where to register complaints²¹⁰

The same phenomenon happens with Bulgaria since it is still unclear if the public knows about these procedures or to have a proper and clear introduction how and when to use them, whenever they need to file a complaint in relation to a certain judicial conduct.²¹¹

The right to present complaints, suggestions and petitions to the state authorities is enjoyed by all the citizens based on the Article 45 of the Constitution.²¹²

Furthermore, the citizen have to right to file complaints with regard to their overall legal interests and rights – based on Article 3 and 6 of the Law on Proposals, Notes, Complaints and Applications, promulgated in SG No. 52 (July 4, 1980), lastly amended by SG No. 55 (July 7, 2000)- to the “social management body”, which is obliged to provide fair and objective

²¹⁰ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 25.03.2008

²¹¹ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 25.03.2008

²¹² Article 45 Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited, 25.03.2008

decisions. But in parallel to that and according to Article 91 of the Constitution, the citizens have the right and can file a complaint on the respective issues at the Ombudsman Office.²¹³ Following that, the competent body has to provide a reply on the subject and theme of the complaint in relation to citizens' rights and obligations even when the complain is unlawful or ungrounded. Also the reply should provide directives and advices on citizens' rights and obligations. Though the two bodies where citizen can file complaints with regard to judicial conduct of the courts and SJC are operational, there are no clear set of procedures followed accordingly by each competent body while processing the complaints, this based on the JRI report for 2006 in Bulgaria.²¹⁴

While it is quite obvious the right of the citizen to complain on the work of the judge, there are no clear set of procedures or uniformed standards on the steps the process goes through, neither such procedures are ever made public or transparent. At the same time, the courts do not have available or qualified staff in order to scrupulously go through all the complaints and properly investigate them.²¹⁵ In general in both countries court hearings are open to the public and the media except in cases when judges are required for reasons provided for in the law to close the courtroom proceedings. Under article 42.2 of the Albania Constitution everyone has the right to a fair and public trial²¹⁶. However a judge may order to close to the public a criminal or civil trial for reasons set forth in the Criminal Procedure Code and Civil Procedure Code.²¹⁷

²¹³ Art 91 Constitution of Bulgaria Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 23.03.2007

²¹⁴ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 24.03.2008

²¹⁵ ABA CEELI, Judicial Reform Index for Bulgaria 2006

²¹⁶ Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 25.03.2008

²¹⁷ Arts 339, 340 Criminal Procedure Code as available at: <http://www.legislationline.org/upload/legislations/ba/fb/3e7ef0be7ad60ee6e16cbd8b63db.htm>; art 173, Civil Procedure Code of Republic of Albania as available at: http://www.coe.int/t/e/legal_affairs/legal_co-

The Constitutional Court may close the doors from the whole or part of the session, justifying on the public moral, public order, national security and the right of private life or personal rights²¹⁸.

Due to the fact that in most cases the space available in the court is small, it is uncomfortable and impossible to accommodate anyone who wishes or is willing to participate during the trial in case it is an open doors one. Also the courtrooms at the first instance courts are very small and it is difficult even to accommodate the necessary people to be present in the courtroom not to imagine of additional people from the public.²¹⁹

Article 121(3) of the Bulgarian constitution states “All courts shall conduct their hearings in public, unless provided otherwise by law”. In addition everyone is entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of the others.²²⁰

With regard to journalists’ access to court hearings, the level of access in Bulgaria is quoted as a very good one based on the JRI Report for Bulgaria on 2006, though as in Albania, even in Bulgaria the restricted space in the courtrooms makes it inappropriate to accommodate a big number of people, including here media beside the parties and their legal representatives.²²¹ In contrary, all the sessions of the Constitutional Court are closed for the public, except in cases

[operation/legal_professionals/enforcement_agents/3_information_from_member_states/Civil%20Procedure%20Code%20Albania.pdf](http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf), last visited, 25.03.2008.

, last visited 25.03.2008; art 173 Civil Procedure Code http://www.coe.int/t/e/legal_affairs/legal_cooperation/legal_professionals/enforcement_agents/3_information_from_member_states/Civil%20Procedure%20Code%20Albania.pdf, last visited 25.03.2008

²¹⁸ Art 21.2, Law Nr 8577 date 10.02.2000, “for the organization and functioning of the Constitutional Court of Republic of Albania”, published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 25.03.2008.

²¹⁹ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf>, last visited 26.03.2008

²²⁰ **Art. 41 Constitution of Bulgaria** Prom. SG 56/13 Jul 1991, amend. SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No.7/2006, SG 12/6 Feb 2007 as available at: <http://www.parliament.bg/?page=const&lng=en>, last visited 26.03.2008

²²¹ ABA CEELI, Judicial Reform Index for Bulgaria 2006 as available at: http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/JRI_2006.pdf, last visited 25.03.2008

when the court acquire expert testimony, invite for an oral argument or just decides to make the session open to the public .²²²

Apart from sessions where immunity waivers, disciplinary proceedings and temporary suspensions of judges are judged, all the sessions of the SCJ are open to public and media.²²³ In principle all the judicial decision should be open, transparent and accessible by the public.

Article 146.2 of the Albanian Constitution requires the publishing of judicial decision in every case. However except the Constitutional Court and the High Court which publish their decisions on a regular basis, the other courts do not respect such constitutional provision.²²⁴

Among the lower court, only a few of them publish some of their decisions. In other cases, only the parties have the right to get copies of the court's decision, while the non-parties are obliged to undergo a different procedure, they first should file a request stating clearly the reason of such request as well as pay for the information requested. Based on the findings of a survey, it was stated by the interviews that there are cases when the presiding judge doesn't want to jeopardize the public interest and/or the one of the parties this is why it can happen that the decisions are not made public or are simple access to them is restricted. On the other hand, it was said by different lawyers and international organizations members that for them it was difficult to get

²²² Art 21 Constitutional Court Act as available at:

<http://www.legislationline.org/legislation.php?tid=112&lid=2828&less=false>, last visited 25.03.2008

²²³ Art. 27(3). Judicial System Act Promulgated, State Gazette No. 59/22.07.1994 last supplemented, SG No. 86/28.10.2005, effective 29.04.2006 as available at: <http://www.cityconsultants.org/LEGISLATION/legislation.html>, last visited 12.03.2008

²²⁴ Arts. 132.2, 142.2 Constitution of Albania approved by the Parliament on 21 October 1998, as available at: <http://www.ipls.org/services/kusht/contents.html>, last visited 25.03.2008; art. 19 Law Nr. 8588, date 15.3.2000 "On the organization and functioning of the High Court of Albania", published in SG nr.7, date 12.04.2000 available at: <http://www.gjykataelarte.gov.al/english/ligji.htm>, last visited 14.03.2008; art. 26 Law Nr 8577 date 10.02.2000, "For the organization and functioning of the Constitutional Court of Republic of Albania", published in SG Nr. 4, date 16.03.2000 as available at: <http://www.gjk.gov.al/eng/ligji.html>, last visited 14.03.2008

access into courts' decisions, which brings the conclusion that the public is encountering big difficulties to get the required information ²²⁵.

In that regard, also the work of the lawyers representing the parties is very much hampered. In addition to that, in case a defendant wants to appeal the court's decision, he/she has the right to do so within the period of 10 days after the decision is taken, while the court's decision is other provided in the form of the summary or just presented partially at the last session of the trial and the full decision report may not be ready before the period has elapsed. In light of this, the interviewed persons have said that maybe in many cases such unclear and settle situation is created in favor of the judges because their decision besides being late, have also poor and inadequate reasoning and legal formulation.²²⁶

²²⁵ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf> , last visited 08.03.2008

²²⁶ ABA CEELI, Judicial Reform Index for Albania 2006 as available at <http://www.abanet.org/rol/publications/albania-jri-2006-eng.pdf> , last visited 08.03.2008

Conclusions

The independence of the judiciary is crucial to democracy. It implies that no outside institutions or forces itself can impinge on the autonomy of the of the judiciary as a whole or of the individual judge²²⁷. However an independent judiciary does not mean a totally isolated branch, turned into a very closed club of friends who under the principle of independence assure their total unaccountability toward the law and the people.

Despite the significant achievements made over the recent years in the area of judicial reform the Albanian and to a lesser degree the Bulgarian judiciary are still weak, judges are widely perceived as corrupt, court proceedings are subject to delays and decisions are not enforced.

The executive branch will often blame the judiciary for corruption but it would also tell people that they couldn't do much because in a democratic system they cannot interfere at all with the affairs of the judiciary.

A restrained minister, a shared leadership, a self-controlled system, all of this can be positively considered, as a consequence of the principle of separation of powers. But, rather than referring to principles, it is advisable to assess the current rules, by taking the practical results into consideration. In other words, does the Albanian and Bulgarian judicial system ensure a decent service to the people and are the judges impartial and professional? Judicial accountability should not be seen as the opposite of judicial independence and judges can no longer hide behind the wall of the independence and fiercely contradict any reform that attempts to create greater accountability.²²⁸

²²⁷) Petter H., Russell, and David M., O'Brien (eds.), «Judicial Independence in The Age of Democracy,» University Press of Virginia, 2001, at 11

²²⁸ Dato' Param Cumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers, Tensions between judicial independence and judicial accountability available at: <http://www.article2.org/mainfile.php/0205/104/>, last visited 27.03.2008

Judicial independence must go hand in hand with judicial accountability²²⁹ and sufficiently balance each other²³⁰. One has to bear in mind that first and foremost the judiciary needs to be seen “*as a service to the public so that the latter can use it with confidence that their interests will be served, and in a timely manner*”²³¹. On the other hand a responsible and accountable judiciary will result in an increased public support by the means of which the judiciary will gain more in its independence. This public support is crucial and will also provide disincentives to the two other branches of the government in their attempts to politically control the judiciary.

In theory, the solution to this seemingly contradictory relationship between “judicial independence” and “judicial accountability” is to find the proper balance or better a perfect system of checks and balances, which in one hand makes the judges totally independent while issuing a judicial decision and on the other hand makes the same judges accountable when acting contrary to the law and/or judicial ethics.

In practice, the solution should be tailored to the specific political, economical and cultural conditions of each country. On the other hand this “solution” is better to be considered as a process through which the judiciary has to improve its performance. At the beginning of this process one might consider as rather strong Minister of Justice having some shared competencies on judicial inspection, on court administration and participation in the judicial councils. Further down into this process and with the improvement of judicial performance such competencies might be totally passed to the judiciary itself with the Minister of Justice having a much minor role in the judicial affairs.

²²⁹ See more about comparative aspects of judicial accountability in M.Cappelletti, «Who Watches the Watchman? A Comparative Study on Judicial Responsibility» in S. Shetreet and J. Deschenes, eds. *Judicial Independence: The Contemporary Debate* (Netherlands: Nijhoff, 1985 at 570..

²³⁰ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 27

²³¹ Luu Tien Dung, United Nations Development Programme Oslo Governance Centre The Democratic Governance Fellowship Programme, Judicial independence in transitional countries, January 2003, page 27

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