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Judicial Culture and the Role of Judges in Developing the Law in in Albania

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JUDICIAL CULTURE AND THE ROLE OF JUDGES IN DEVELOPING THE LAW IN ALBANIA*

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1. INTRODUCTION

Albania currently has the status of a candidate country, having applied for EU membership in 2009. The European Commission in 2010[1] and 2012[2] conditioned the opening of the accession talks with the fulfillment of some recommendations. In each of these recommendation rounds, the justice reform was one of the key priorities. Different Progress Reports from 2011-2014, under the rule of law (Copenhagen Criteria), have raised several red flags on the situation of the judiciary in the country and highlighted the need for intervention. Corruption in the judicial system and political intervention in the promotion of judges, especially in the appointment of High Court[3] and Constitutional Court[4] justices were considered a major concern. The Progress Reports have also noticed managerial, financial, and administrative[5] shortcomings in the judicial sector, problems with the transparency[6] and accountability of judges, concern over their disciplinary proceeding, their transfer and process of evaluation.[7]

In order to align with the Commission's recommendations, as well as to respond to the need of the Albanian society for a reform in the justice sector, in 2014 the Albanian government started the process for a deep and comprehensive justice reform, which was approved in 2016 with the consent of all political parties. The newly adopted justice reform changed around 1/3 of the Albanian Constitution and it is compounded by a special package of 27 laws and other dozens of bylaws. The number of legal interventions is a sign of the very deep and transformative reform in the judiciary. As the justice reform and the monitoring of its implementation is focused on the organizational aspects of the judiciary, little attention is given to the capacity of judges to interpret the law and their level of preparedness to respond to the challenges of EU integration. Judges in Albania seem to be far removed from the EU integration narrative in their everyday work, although they are expected to act as European judges once the country has become an EU member. This gap between the reform in the organization of the judiciary and the preparation of judges to respond to the challenges of the application and interpretation of EU law was noticed also in other Central and Eastern European countries (CEEC). As *Gutan* has summarized it: "

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1 European Commission (2010) Commission Opinion on Albania's application for membership of he European Union, Brussels, 9.11. 2010, COM (2010) 680, pg.11-12. https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2010)680&lang=en

2 Progress Report 2012: Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2012-2013 {COM(2012) 600 final. https://ec.europa.eu/neighbourhood-enlargement/2012-progress-report-albania_en

3 Progress Report 2014, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions Enlargement Strategy and Main Challenges 2014-2015 {COM(2014) 700 final} 8.10.2014, f. 46 https://ec.europa.eu/neighbourhood-enlargement/2014-progress-report-albania_en

4 Progress Report 2011: , Communication from the Commission to the European Parliament, the Council Enlargement Strategy and Main Challenges 2011-2012, 12.10.2011, f. 6,13 , 61 https://ec.europa.eu/neighbourhood-enlargement/2011-progress-report-albania_en

5 Progress Report 2012, cit. supra, pg.14 ; Progress Report 2014 cit supra, pg. 48, 49

6 Progress Report 2012, cit. supra, pg.13

7 Progress Report 2014, cit. supra, pg. 47

Despite their strong political commitment to European integration, the national judiciaries in the CEECs, proved to be poorly methodologically equipped to face the burden of European legal integration. Textual positivism, primitive positivism, reluctance towards the binding legal precedent, 'the lack of knowledge and ability', mechanical jurisprudence, rudimentary descriptive approach towards the study and application of legal norms, ignorance towards persuasive arguments and soft law, disregard of comparative law -are but few ***cultural traits of the CEE judiciaries*** *which endanger the European legal-cultural integration."* [8]

Thus, the successful implementation of the EU driven justice reform in the "local garden of justice" will depend not only on the vertical technical and financial aid given, but also on the home-grown soil and the uprooting of the existing weeds. Therefore, understanding the judicial culture in the country is important to improve the implementation of the justice reform and achieve the transformative effect desired. This paper is written in the framework of the project 'Bridging the gap between formal processes and informal practices that shape judicial culture in the Western Balkan'. The aim of this research paper is to observe the features of the judicial culture in Albania and recommend horizontal vectors that would improve the proper implementation of the justice reform in the country.

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[8] Gutan, Manuel "Judicial Culture as Vector of Legal Europeanization In *"Europeanization and Judicial Culture in Contemporary Democracies.* Edited by Gutan, Manuel and Bianca Selejan Guţan. Hamangiu, 2014, pg.73

2. RESEARCH FRAMEWORK AND METHODOLOGY

Judicial culture is the legal culture[9] demonstrated by the community of judges. Exploring the different layers of culture[10] and breaking the "distance, air of mystery and cloak of secrecy"[11] of judges are both ambitious goals. However, for the purposes of this paper, we will limit the focus of our research on very specific aspects of this notion. Firstly, based on the work of Friedman and Cottrell we will limit our research in the units of professionals of law, and more specifically judges, and their **internal culture.**[12] There is a vast literature on the external culture of the judiciary, its institutional design, independence, the perception of citizens, and the relationship of the judiciary with politics. However, the internal cultural aspects of the judiciary are not properly explored. Secondly, we will not analyze the internal judicial culture from the anthropological, ethnographical or sociological point of view. Rather we would construe from the definitions of Bell and Mak on judicial culture. Bell defines the judicial culture as the set of *"features that shape the way in which the work of a judge is performed and valued within particular legal systems"*.[13] According to Elaine Mak, this "concept addresses judicial functioning as a whole, i.e. both the primary process of judging and the judicial organization."[14] Both definitions delineate the aspect of work culture, thus concepts related to the perception of judges about their everyday judicial activity and approach towards law. In fact, the way judges work, their everyday hidden internal dynamics, their routine and informal practices speak volumes about their role on the society and the way they apply the law. Therefore, in our research we will try to identify the Albanian judges' ideas, values, attitudes, beliefs, habits, or opinions about their role in the society, what influences their work and judicial activity and their relationship with the law.

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9 Van Hoecke, Mark, and Mark Warrington. "Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law." *International & Comparative Law Quarterly* 47, no. 3 (1998): 495-536.; Nelken, David. "Using the concept of legal culture." *Australasian Journal of Legal Philosophy* 29 (2004): 1-26.; Nelken, David. "Thinking About Legal Culture." *Asian Journal of Law and Society* 1, no. 2 (2014): 255-274., Church, Thomas W. "Examining local legal culture." A*merican Bar Foundation a d Research Journal* 10, no. 3 (1985): 449-518., Trubek, David M. "Where the action is: critical legal studies and empiricism." Stanford Law Review (1984): 575-622. Sunde, Jørn Øyrehagen. "Champagne at the Funeral." *Rendezvous of legal cultures, Bergen, Fagbokforlaget* (2010): 11-28.Erdos, D. (2009), Kahn, Paul W. "Judicial ethos and the autonomy of law." (2006).accessed at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1321&context=fss_papers

10 Hofstede, Geert, Gert Jan Hofstede, and Michael Minkov. *Cultures and organizations: Software of the mind.* Vol. 2. New York: Mcgraw-hill, 2005., pg.18.

11 Moran, Leslie J. "Feminist judgments: From theory to practice." (2012): 287-290, pg. 287

12 "The internal legal culture is the legal culture of those members of society who perform specialized legal tasks." Friedman, Lawrence M. *The legal system: A social science perspective*. Russell Sage Foundation, 1975. Cited in Friedman, Lawrence M. "Law, lawyers, and popular culture." Yale LJ 98 (1988): 1579. Pg.1581

13 John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006) 2.

14 Mak, Elaine, Niels Graaf, and Erin Jackson. "The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of Judicial Culture." *Utrecht J. Int'l & Eur. L.* 34 (2018): 24. Pg. 27

To help the inquiry of our research we have conducted 11 semi-structured interviews[15], among which 8 semi-structured interviews with judges and 3 interviews with lawyers. The judicial system in Albania has gone through different legal reforms, making the categories of judges in terms of their recruitment process, appointment, experiences and education very different. To have a diversivied pool of interviewees, we created a list with four category of judges: (1) judges who have finished law school and worked during the communist regime, (2) judges who who attended legal education during the communist regime but worked as judges after the communist regime collapsed (after 1992), (3) judges who finished the law faculty or the intensive course for judges[16] after the fall of communism but did not attend magistrate school and (4) judges who have finished law school after the fall of communism and attended magistrate school. To avoid selecting judges from friendly circles, we have officially requested from the High Judicial Council a list of judges for each category and then contacted them randomly. We have succeeded to have one representative for each of the above-mentioned categories in our sample of interviewees. We have also tried to have a diversified pool of judges in terms chambers and size of the courts, gender, age and professional experience[17]. In order to confront some of the main findings with the "outsider's point of view, we have also conducted interviewees with 3 other lawyers whose background was in academia, civil society and legal practice. Lastly, the information obtained through the interviews was linked with other resources such as legislation, case law and academic scholarship. Following these lines of inquiry, the approach in this article will use four categories of sources to construct the role of judges in developing the law in Albania. These categories of sources are: (a)legislation, (b)case law, (c)academic scholarship and (d)semi-structured interviews and they will be used as basis to develop the three research questions:

(i) What is the role of judges in developing law in Albania?
(ii) How do Albanian judges approach law?
(iii) What is the role of the Constitutional Court in the development of law and judicial culture?

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[15] We have based our semi-structured interviews and methodology on the work of Jaremba, Urszula, and Elaine Mak. "Interviewing judges in the transnational context." Law and Method 2014, no. 2 (2014), pg.7 accessed at *Utrecht University Repository*: https://dspace.library.uu.nl/handle/1874/314666

[16] After the fall of communism, the Council of Ministers decided to open the judicial system to anyone that desired to be a judge upon the completion of a 3-6 months intensive course for judges and prosecutors. See: Decision of the Council of Ministers No.133, date 26.03.1993, Official Journal Nr.6, pg. 373.

[17] We have interviewed judges from civil, criminal and administrative chamber, as well one former High Court Judge and tried to cover courts residing not only in Tirana, but also other districts such as Shkodra, Elbasan, Vlore etc.

3. THE ROLE OF JUDGES IN DEVELOPING THE LAW IN ALBANIA

The perception of the role of judges in developing law has changed over time, with the development of the state and law itself[18]. François Ost identifies three distinct roles of judges over history, baptizing them as *Judge Jupiter, Hercules and Hemes*. According to him, in the classical liberal states the judge played the role of the referee (*Judge Jupiter*). The referee judge would settle the decisions according to law and would apply the will of the law to a litigious case[19].The judge would conduct the process according to the legal provisions, have a passive attitude and be the prudent guardian of separation of powers.[20] With the emerging of the welfare state, the judge started to behave as a "social engineer", who manage different interests and try to give the best solution to a problem (*Judge Hercules*).[21] In giving a decisions they are guided by the public polices adopted by the welfare state in different sectors, follow the developments of legal practice, adopt the decisions to the circumstances of the case and monitor the execution of the sentences. They are interested above all on the quality and outcome of the case rather than compliance with law.[22] After the development of the rule of law state, the role of the judge was re-dimensioned. The judge navigates on a web of different laws, national and international and resolves the dispute not based on a specific program, but on the grounds of proportionality and subsidiarity (*Judge Hermes*).[23]

Although physically in Europe, due to historical factors and actors, Albania did hardly followed this pattern of state development as other European countries. Albania gained its independence from the Ottoman Empire in 1912, an occupation that lasted for 5 centuries and that succeeded another 6 century occupation of the Roman and Byzantine empire. Although this is not the place to go in a deep analysis of the characteristics of the history of judicial and legal culture in Albania, there are two main general assumption we can make for the period before the declaration of Independence. Firstly, the continuous occupations did impede the normal development of local law, and the establishment of a court system that would

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[18] Ost, François. "*Juge-pacificateur, juge-arbitre, juge-entraîneur. Trois modèles de justice.*" (1983). *Fonction de juger et pouvoir judiciaire. Transformations et déplacements*, a cura di Ph. Gérard, F. Ost e M. van de Kerchove, Bruxelles, Publications des Facultés universitaires Saint-Louis, 1983, pp. 1-70; ID., «Quelle jurisprudence pour quelle société?», in *Archives de philosophie du droit*, n. 30, 1985, pp. 9-34., accessed in Italian from Rassegna Forense - 3-4/2013 in https://www.consiglionazionaleforense.it/

[19] Ibid. pg.701

[20] Ibid

[21] Ibid. pg.702

[22] 702

[23] Ibid.

further develop its own ideologies[24]. Secondly, the positive law was for a long time the foreign law, or the law of the occupiers, and as such was seen with disrespect. The court system was seen with mistrust as the appointed judges would rather comply with the interests of the foreign powers, than apply the law or balance the different interests of the parties. Sometimes foreign appointed judges also abused with their power and were notoriously known for corruption.

In its short life after independence from 1914-1939, the legal culture began to lean towards the Italian culture mostly but also influenced by the French and Swiss one.[25] Although there are isolated positive examples, the local courts in Albania during this period had their ideological moments. For example, although it was neither part of judicial/legal practice in France nor Italy, it was foreseen that the dissenting opinion of judges should be made public.[26] In 1931, also the Court of Dictation did the first constitutional control of the law of the Parliament.[27] However, despite the efforts to build a new legal system and reform the judiciary, one of the challenges of the independent state during, especially during the 1920s, was the lack of qualified and well-educated lawyers who could sit as judges. The general tendency was to replace the old officials with educated young ones[28], especially with those educated abroad[29]. Moreover, apart from structural problems, the Albanian judiciary in the 20-30s was characterized also by very frequent changes of constitutions and legislation and an unstable political climate which certainly affected even the development of the judiciary and its independence.

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[25] The foreign occupying empires imposed their own legal system and established their own courts, with judges appointed and under their control and supervision. On the other hand, in the most remote area of the country local customary law applied and the judicial system was based on their local elderly councils. Sometimes the local law and the foreign/occupiers legal system interchanged and borrowed with each other. The different occupations tended to give some concessions and autonomy to Albania by delegating minor cases to the local judges,. or by orienting their court officials to respect the local law and existing country regulations, unless it conflicted with their legal system. However, there were times of harsh conflicts between the different legal systems and where the application of the local law by Albanian citizens or addressing a case to the elderly councils would amount to imprisonment or deportation. See\; Luarasi, Aleks. "Akte Juridike për historinë e Shtetit dhe të së Drejtës në Shqipëri" OMBRA, 2014, pg. 117. Luan Omari, E drejta zakonore dhe e drejta zyrtare në Shqipëri (shek XIX-XX), Drejtësia Populllore 3/1990, fq65. Cit Koco Nova, Parathënie për botimin e Kanunit të Lekë Dukagjinit. E drejta zakonore e popullit shqiptar.

[26] For example the, Criminal Code of 1927, was based on Italian criminal law. As for the Civil Code, it was based for the most part on the Italian Civil Code (of 1865) as well as certain parts were taken directly from the French Civil Code. Regarding the Commercial Code of 1932, the land trade part is based on the Vivante project (which aimed to reform the Italian Commercial Code, but was not approved), while the maritime and bankruptcy law is based the Italian Commercial Code of 1882 itself, which includes subsequent amendments. Another aspect is the adoption of the Military Criminal Code in Peacetime in 1932 which was based mainly on the Italian legislation of that time.

[27] See article 15 of the Kanuni Zhurise and Article 11 of the Law on the Organization of State Council.

[28] Nova, Koço, "*Zhvillimi i organizimit gjyqësor në Shqipëri*", Kombinati Poligrafik, Tiranë 1982, pg. 83-85. Anastasi, Aurela, "*Historia e së drejtës kushtetuese në Shqipëri 1912-1939*", Shtëpia Botuese "Pegi", Tiranë 2007, pg.185-187.

[29] One solution given immediately after the declaration of independence was to preserve the old judges who had knowledge on the ottoman law and replace the clerks with young lawyers who would advance the use of the Albanian language in the court procedures. See Nocka Irakli. "Gjyqtarët Shqiptarë në gjysëm shekulli". Drejtësia populllore no. pg. 35 and 36.

[30] During the short ruling of Fan Noli in 1924 it was drafted a law " On the quality of courts and the appointments." The requirements to be a judge, apart of being an Albanian citizen, having finished the law school and have a 3 year working experience, was also the knowledge of a foreign European language. Ismet Elezi. "90 vjetori i ditës së drejtësisë". Jeta Juridike no.1, 2003, pg.72.

After the Italian (1939-1943) and German (1943-1944) invasions, in 1945, in Albania it was established the Communist system. As in other similar socialist countries, the system was characterized by the unity of power and the prevalence of the Parliament and Party Bureau over other the judiciary[30]. The judicial activity was seen as an activity "of a deep social political character"[31] since it aimed to provide "protection of the socialist order, the proletariat dictatorship, the education of the masses in the process and the proclamation of the Party's politics and the communist moral".[32] Concepts such as the law is elastic or judges can interpret the law as they deem proper were considered unacceptable. Judges could not be guided by any other motive, apart from the content of the law, where the line of the party is materialized and where the interest of the socialist state and the legal rights of the citizens are protected."[33]

After the fall of communism in 1991, Albania started the process of legal, economical and institutional transformation. Similarly with other Central and Eastern Europe countries, Albania also experienced a triple transition": the simultaneous marketization, democratization, and state-building of a country.[34] Part of the complex state-building process was also the establishment of an independent, impartial and effective judiciary. The legal and judicial system went into dramatic changes, starting with the drafting of new legislation[35], the establishment of new courts, the creation of the Magistrate School for Judges and Prosecutors, and the attempts to change the existing judicial elite[36]. The internal process of transformation was also coupled with the effort to open the country towards international partners and international developments. This is evident not only from the ratification of different international agreement, or the expressed will to be part of different international organization such as NATO, CoE EU, but also from the openness to have foreign experts included in the process of drafting the national legislation.

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[30] Bobek, Michal. "Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (non) Transformation." *In Fair Reflection of Society in Judicial Systems-A Comparative Study*, pp. 121-146. Springer, Cham, 2015.

[31] Tamara Malaj, Roli i ndihmës-gjyqtarëve në dhënine e drejtësisë, Drejtësia Populllore 4/1983, pg. 14

[32] Ibid. Article 4 of the Code of Criminal Procedure. See further Chapter 2 "Procedura Penale e Republikës së Shqipërisë. Pjesa e Përgjithshme." Aranit Cela, Raapi Mino, Grigor Gjika, Tirana 1987, pg. 35-62

[33] "Probleme të Kongresit të 8të të Partise së Punës së Shqipërisë. Të hetojmë e të gjykojmë me drejtësi cdo cështje penale dhe civile." Drejtësia Populllore, Nr.1/1983, pg.7

[34] Koslosky, Daniel Ryan. "Toward an Interpretive Model of Judicial Independence: A Case Study of Eastern Europe"(2009)." *University of Pennsylvania Journal of International Law* 31: 203.

[35] From 1992-2008, the justice system was subject of many legislative changes, touching issues of proceedings in court, status of judges or the establishment of new courts. Law no.7574, date 24.6.1992; Law no.8265, date 18.12.1997; Law no.8436, date 28.12.1998; Law no. 9877, date 18.2.2008.

[36] The first attempt was in 1993 with the intensive course for judges and prosecutors. By a decree of the Council of Ministers it was decided to recruit new judges and prosecutors through the successful completion of a 6 months course. We see the second attempt to replace the communist judges elite with the approval of the Law of Lustration in 1995. According to this law, those who during the communist regime have served as member of the Political Bureau, member of the Central Committee, employee of the State Security Department in the Central Committee, president of the High Court, General Prosecutor, have participated as an investigator, prosecutor, judge or assistant judge in special political processes etc. could not serve as judges or prosecutors. The third effort was done in 1997 with the establishment of the Magistrate School, which was transformed in the most important portal to enter the judicial system.

One can picture the Albanian judge[37] during the period of transition from communism to democracy, navigating between the lack of a local "model of a judge" or judicial ideologies, the web of a multitude of emerging national and international law and the very dynamic outset that required fast decision taking. The newly appointed judges, but also those who have been working in the judicial system during communism had little experience with review of legislative acts, discretion to use different tools of interpretation, or even a narrow frame of independence[38]. The justice bodies *were perceived as forums for solving "small" problems between private parties. without any potential to influence the countries' development policies*.[39] Therefore courts were "passive bystanders" and seen more as an instrument for enforcing decisions of the executive rather than an independent power. Judges were looked upon as legal experts, rather than participants in the process of government—a symptom of the overall lack of legitimacy of the judiciary.[40] Moreover, in its early years after the fall of communism, the highest court jurisprudence and even the academia failed to inform the judiciary about their role in developing the law. There was a vacuum of the scholarly literature on judges and the judicial process, since books and articles published during communist times were deemed not adaptable. The poor literature review on the role of judges in developing law is still eminent today.

On the other hand, the existing legal framework and legal practice was perceived as to shape a judge that resembles the model of *Jupiter Judge*. In fact, ever since the adoption of the Civil and Criminal Codes and the enactment of the statutory laws in 1994[41], the legal framework tends to lean towards the creation of a judge-referee (Jupiter Judge) rather a norm-creator. Judges are considered as arbiters who *"play a neutral role in the discovery of truth and orient the parties in the process."*[42]; referees in conflicts between parties, who determine who will end up victorious by applying the law to the facts.[43] The course of the judicial process is determined by the parties and even in those cases where the judge is placed in an active position, or the process is no longer contradictory, the judge must be completely neutral and restrict the use of his

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[37] As said by one judge during the interview "*the problem with judicial culture in Albania is that in none of the legal orders and phases of state development in Albania did we succeed to establish the proper role and figure of the judge.*" [41] Koslosky, Daniel Ryan. "Toward an interpretative model of judicial independence: a case study of Eastern Europe." *U. Pa. J. Int'l L.* 31 (2009): 203. Pg:204

[38] Koslosky, Daniel Ryan. "Toward an interpretative model of judicial independence: a case study of Eastern Europe." U. Pa. J. Int'l L. 31 (2009): 203. Pg:204

[39] Komisioni i Posaçëm Parlamentar për Reformën në Sistemin e Drejtësisë. Grupi i Ekspertëve të nivelit të lartë. Analizë e sistemit të drejtësisë në Shqipëri, Tirane 2015: 8

[40] Koslosky, Daniel Ryan. Ibid, pg.212.

[41] Adoption of the Civil Code Fletore Zyrtare Nr. 11, Fq. 11, viti 1994. Criminal Code Fletore Zyrtare Nr. 9, 10,11, Fq. 343, 391, 439, viti 1996.

[42] Flutura Kola Tafaj, Asim Vokshi " Procedura Civile", Pjesa I, Shtepia botuese ILAR, Tirane 2013, fq.108. See further : Halim Islami, Ilir Panda, Kreshnik Spahiu, Artan Hoxha " Procedura Penale e Republikes se Shqiperise", Tirane 1996, fq. 24-32; Sokol Sadushi "Drejtesia Kushtetuese";

[43] Ryder-Lahyey, Pamela, Kosta, Vangjel, Gogu, Toni "Administrimi i Gjykatave", Shkolla e Magjistraturws, 2005

personal knowledge to the facts under discussion.[44] This Jupiter Judge style in the administration of the judicial process can be found even in some dicta of the Constitutional Court. In different decisions the CC has stated that:

" courts' decisions must contain the legal provision on which the settlement of the dispute is made, the analysis of the evidence and the manner of the dispute is resolved…[T]he judge should clearly state the facts and the applicable law, which have led him to make a choice between several possibilities. Thus, the judge must explain the reasons for his decisions, referring to the facts for which the trial took place, the applicable laws and the various requests of the parties."[45]

The way in which judges conceive their role is a significant factor in the entire decision-making process.[46] Judicial decision-making can be a direct outcome of judicial 'role perception' as it relates to judges general position in society. That is why an important part of our research were the perceptions of Albanian judges about the way they apply the law and their role in the society.

When we asked judges in the framework of this policy paper about their role in the development of law and judicial culture, there were different opinions. The data collected from the interviews show that judges in Albania fall into two groups: those who consider themselves officials who are bound and required to apply the law (*Judge Jupiter*) and those who believe that judges have a clear role in developing the law, called policymakers or lawmakers (*Judge Hercules*). According to one of interviewee, *"a judge is not merely a state official, but a missionary in the society, a prophet or a pastor- who with his model attracts society towards him."*[47] Another interviewee stated that the *judiciary is a protagonist power, creator of the law and not a mere law enforcer. The imperfections of the law are adjusted by judges…"*[48] However, the majority of the interviewed judges emphasized that they were subject to the Law and the Constitution and referred to themselves as a sub-legal entity, or a servant of the law.

We are aware that the responses of judges on their role in the society are not only related to the judges' self-perception or the judges' verbosity, but also the willingness to take time for the interviews as well as the depth in which they have analyzed the role in the past.[49] Having said that, in order to obtain a deeper understanding of what features shape judicial culture[50] and the work they perform, we have

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[44] Alessandor Simoni, Sokol Sadushi, Sokol Como, "Vështrim Krahasues mbi Procedurën Civile", Shkolla e Magjistraturës, shtëp.bot. "Kristalina - KH", Tiranë .2006, fq. 90.
[45] CC Decsion no. 11, date 02.04.2008
[46] Flango, Victor Eugene, Lettie McSpadden Wenner, and Manfred W. Wenner. "The concept of judicial role: a methodological note." *American Journal of Political Science* (1975): 277-289.
[47] ALBJCINT 2021-4
[48] ALBJCINT 2021-4
[49] Flango, Victor Eugene, Lettie McSpadden Wenner, and Manfred W. Wenner. ibid pg 277
[50] John Bell, Judiciaries within Europe: A Comparative Review (CUP 2006) 2. Judicial culture is considered the "*features that shape the way in which the work of a judge is performed and valued within particular legal systems*

followed up with the judges regarding the factors that influence their role and the exercise of judicial function.[51]

Some of the judges stressed that judicial independence is an important factor that affects their power and position in the legal system. In fact, *de jure* and de facto judicial independence are the first prerequisite for judges to develop law and the Albanian judicial culture has been suffering the dearth of both. These factors are assumed to influence behavior and promote judicial autonomy. *De jure* independence' is usually measured by indicators of formal safeguards such as fixed tenure, multilateral appointment procedures, budgetary autonomy, and judicial councils[52]. *De facto* independence is often conceptualized as judges not responding to undue pressures to resolve cases in particular way[53]. Judges interviewed showed awareness of the importance of these concepts and their inter-reliance. From one side, they stressed that de facto independence is conditioned by de jure independence. As summarized by a judge "*It is very hard to resist and exercise individual independence when the entire system runs against you*.[54] However, interviewees pointed out that even when the external independence is guaranteed, judges might still tend to show a "culture of gratitude"[55] towards the political power, have a certain inclination towards the executive, even when there are no clear threats or pressures. As an example of judges' internal intimidation from the executive, where indicated cases in court where the State is the defendant. Some judges would use every formal, procedural and legal clause to rule in favor of the State and dismiss every request made by the private party, or avoid judging the case by closing it.[56] Unfortunately, there have been interviewees who reported that such problems still exist even after the justice reform in 2016, which made a strong shift pro (external) judicial independence.

Another shortcoming that impairs the judges from properly exercising their role in the society is the continuous reformation of the judicial sector. Judicial reforms sometimes attempt to constrain or curb the judiciary, either for electoral support in response to public opinion, or as a way "to create an issue constituency and politicize the judiciary."[57] Court-curbing legislation usually seek to alter the

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[51] According to Elain Mak this "concept addresses judicial functioning as a whole, i.e. both the primary process of judging and the judicial organization." Mak, Elaine, Niels Graaf, and Erin Jackson. "The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of Judicial Culture." *Utrecht J. Int'l & Eur. L.* 34 (2018): 24.

[52] Van Dijk, Frans, Frank van Tulder, and Ymkje Lugten. "Independence of judges: judicial perceptions and formal safeguards." *Raad van de Rechtspraak Working Paper* 1 (2016).3

[53] Ibid.

[54] Interview with a Professor of Constitutional Law, University of Tirana.ALBJCINT 2021-8.

[55] Ibid.

[56] Interview with a Judge of District Court of Tirana ALBJCINT 2021-5

[57] Moyer, Laura P., and Ellen M. Key. "Political opportunism, position taking, and court-curbing legislation." *Justice System Journal* 39, no. 2 (2018): 155-170.

Court's composition, jurisdiction, budget, procedures, and remedies to resolve disputes[58]. Studies contends that court curbing legislation challenges courts institutional legitimacy and elicit a change in judicial behavior.[59] According to some of the interviewed Albanian judges, continuous reforms on the judiciary create a situation where the status of judges is not clear and stable, and they feel unprotected and expendable, although their status is permanent by law.[60] This affects both their stability and their self-perception on their role in the society.[61]

A common concern for almost all the interviewed judges was the ways in which the public and the media engage with the courts and the judiciary. Media outlets often comment on specific court cases, infringe the principle of presumption of innocence and create a strong public pressure for the judge to rule in accordance with the public opinion.[62] For some judges the pressure of media and politics is more sensitive when political parties or VIPs are involved as parties in a case. For others, the pressure of the media is felt more by the ordinary first-instance judges since they are in a closer and more frequent contact with the journalists. There were other judges that expressed the view that the intensity of the media pressure or political pressure depends also on the geographical position of the court with courts located in the capital and in major cities being more exposed to pressure in the day-to-day business as opposed to judges in the outskirt regions. Although judges when giving a decision are focused more on legal and procedural factors and extralegal factors have a low impact on the judicial process, they cannot be totally indifferent when the case they are handling is the main headline of the day. In fact, the constant stream of media outputs on sentencing issues are hard to ignore for any judge in any European jurisdiction[63]. Each individual judge cares about his reputation with the relevant audiences, but also about the reputation of the group as a whole.[64] Thus, public opinion may influence judges by forecasting the effect that a certain decision will have on their reputation, both with the general public and within the legal community.[65] The perception that judges have for themselves and their duty will distinguish a judge that is hostage of public *animus* against the anti-majoritarian judge, the pragmatist from the idealist, the one that uses formalism to escape the weight of judicial reasoning from the one that acknowledges himself as political actor who develops the law. On this regards, media

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58 Hager, Lisa. "The Legal, Institutional, and Political Factors of Congressional Court-Curbing: The Purpose and Seriousness of Attempts to Constrain the United States Supreme Court." PhD diss., Kent State University, 2016.pg.21

59 ibid, pg.22

60 Interview with a Judge from the District Court of Shkodra, ALBJCINT 2021-7

61 Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5

62 Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5

63 Lowenstein, Max. "An irrelevant media when sentencing?–Comparing the perceptions of English and Danish lower Court judges when sentencing theft offenders." *In-Spire: Journal of law, politics and societies* 5, no. 2 (2010): 35-48.

64 Garoupa, Nuno, and Tom Ginsburg. "Judicial audiences and reputation: perspectives from comparative law." *Colum. J. Transnat'l L.* 47 (2008): 451.

65 Roesch, Benjamin J. "Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine." *Suffolk UL Rev.* 39 (2005): 379.

trainings and a good education would help judges how to manage public and media pressure and have an adequate and balanced response towards their high profile cases: from one hand resist pressure and preserve their impartiality and on the other hand explain their rulings and help the public understand how judges serve society and render justice.

Moreover, popular culture influences judicial culture and the role a judge plays in the society.[66] Self-perception albeit a private internal category is influenced by popular, contextual and legal culture. As one of the interviewees stated "*judges are not an isolated part of the society; neither are judges a part coming from somewhere else and which must adopt to this environment, nor are they a part which stands in opposition to society*.[67] Problems that appear in different social or professional groups are also reflected in the collective and individual behavior of judges. One of these features found in popular culture and reflected in the judiciary is what the author of this research has coined as the "pal culture". The "pal culture" put in the context of the judiciary envisions that citizens, relatives, or family members might approach judges in informal ways to ask for advice, information, or help about a legal case. They might ask for help without always having the intention to illicitly engage judges in nepotism, favoritism, or corruption.[68] The "pal culture" requires the judge to recognize family/friendship affiliations as another form of authority apart from the law. As one of the judges has put it "*being a small country, with a tradition of very close communication where people communicate a lot, confess a lot to each other, are curious, seek to be involved, might turn into a disturbing pressure for the impartiality of a judge and make the performance of a judge influential.*" The "pal culture" might have its roots in the period before the declaration of independence, when during the different foreign occupations, a net of solidarity and mutual help was seen as a method of surviving or even a sign of honor and respect. The involvement of family members, relatives and friends in helping to resolve a court dispute, might be also linked with the old tradition of elderly councils where the cases were resolved by elders of the community, or might be a redundancy of the communist period, where lay people were involved in solving the cases in

[66] "Legal systems invests, inhabits, and flows out of the same society that produces and sustains popular culture. Therefore, it is important to understand how popular culture affects also the self-perception of judges and their role in applying law". See Friedman, Lawrence M. "Law, lawyers, and popular culture." *Yale LJ* 98 (1988): 1579.

[67] Interview with a former Judge of the Supreme Court, currently serving at the Appellate Administrative Court of Tirana, ALBJCINT 2021-3

[68] Interesting is the fact that instead of the phrase "asking for a favor", other terms such as "solidarity", "honor", "support" for oneself/friend or relative are used.

court. It might also be a cultural element, inhibited in the fact of being a small territory with a small population. However, familial and friendship ties often influence the fate of a certain case, and this is a disturbing issue raised also by private attorneys and those who practice law.[69] Although the 2016 justice reform and the bylaws adopted by the High Judicial and Prosecutorial Council have introduced strong rules with regards to family ties, impartiality and conflict of interests, still this cultural notion has to be addressed and be subject of further studies and other soft forms of interventions.

In this institutional and contextual setting, often in the name of independence and impartial judgement, judges tend to self-isolate. Unfortunately, this self-isolation is extended also in the relations judges create among themselves. As noted by a judge, who has also served in the High Court, "Judges often refuse to hear each other's opinions or budge on their position in the debates arising within the judicial collegial troupe". This is counterproductive especially for cases where three or more judges sit. This might also be a reason the association of judges are not so strong and influential in the country and often easily penetrated by political influences. In this optic, we would recommend more training on soft communication skills and collaboration between judges and within association councils.

Instead of a conclusion on the role of the Albanian judge in developing the law or the (f)actors that influence judges self-perception and their discretion to develop the law, we would recognize the dearth of legal and multi-disciplinary research in this field and encourage further studies. The above features of the judicial culture are neither exhaustive, nor deeply discussed. More research is needed to explore the attitudes of judges, what influences them, how they feel and work. Only a thorough understanding of the judicial culture's features, would help policymakers to draft better policies and design horizontal vectors that improve the status of judges in the society, preserve their independence and impartiality and improve the quality of justice.

[69] Interview with an Attorney at Law, ALBJCINT 2021-10; Interview with a Judge of the Administrative Court in Tirana ALBJCINT 2021-11; Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5

4. JUDGES' APPROACHES TOWARDS THE LAW IN ALBANIA

Judges in Albania have both the power and obligation to apply the law[70]. A judge is expected to resolve cases by applying the legal provisions and matching them with the facts of the case. Thus, judges are expected to resolve cases by applying the specific legal provision to the given facts[71] without giving any consideration to values or beliefs that influenced their decision making.

The interpretation of the law is not the prior and main activity of the court. Instead, the main function of the court is to apply the law as it is. Only when the law has ambiguities in certain cases can a judge engage in interpretation. It seems like there is a *modus operandi* with regard to the interpretation of the legal norms when solving the case. First, the judge should search and find and apply the adequate law to solve the respective case. Only in cases when this is not possible do judges interpret the law by using different methods and instruments.[72] In this regard, the interpretation of laws is a subsidiary function that is called into action when the prior and main function- i.e. the application of the law is not possible. For example, the Constitutional Court when describing the judicial activity has said: "*Judicial activity consists in the application of a legal provision … to a specific concrete issue. However, it is not always possible for the judge to identify the norm (legal rule) applicable in the case under review and [in this case] a search is carried out by him using a series of interpretive criteria.*"[73] Interpretation seems to be a faculty of the courts, which comes as a subsidiary in resolving a case when the law is either insufficiently clear or it does not exist. The same rationale was identified in different interviews. Almost all the interviewers admitted that in most of the cases the majority of judges in Albania apply the law and have a formalist approach to law rather than engage in interpretation. Judges said that when the law is clear and there is an already settled practice on that case, they just apply the law as it is, but they did not mention any consideration about the outcome of the case or what would happen if the application of law in these cases led to an absurd outcome.

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[70] Art.16 of the Civil Code of Procedures provides that "*the court resolves the dispute in accordance with the legal provisions and other norms in force, which are mandatory to be applied.*"
[71] For instance, the Criminal Code of Procedures provides that "*the courts resolve the dispute based on the evidence that is presented during the judicial hearing*"
[72] CC Decision No.28/2008
[73] CC Decision No. 6/2012, para 8

Judges consider themselves bound by the law and by law they refer to the formal acts of the Parliament. Judges do not pass moral values in their decisions or display the internal considerations they balanced in the decision-making process. They follow the will of the legislator, and they do not challenge it on general principles such as fairness or equity. For example, during one of the interviews, one of the judges stated that he thought that the law on the process of legalization in his point of view was immoral. He said that it was unfair to take the land from the owner and give it to the one that had forcefully or unlawfully occupied it. "However, this is a solution that the legislator has given to this social conflict, and I cannot go against it, whatever I think about it"[74]. The usage of other resources such as the international agreements, doctrine, comparative analysis is not usually employed by judges for varied reasons. Some judges said for example that all the international agreements are detailed in laws and bylaws, so when solving a case they prefer to solve the case by applying the domestic law/bylaws and use the international provision alongside the national provision.[75] Another judge mentioned that one of the reasons reason why judges in Albania prefer to use the law implementing an international agreement, rather the international agreement itself, is because for a long time the international agreements ratified by Albania were not translated into the local language.[76]

On the other hand, authentic interpretation does not have any relevance for the Albanian judges today[77]. There is neither an institute nowdays through which courts can ask for an authentic interpretation by the Parliament nor is there any tool through which the Parliament might impose its interpretation to courts. With regards to the use of legislative history, this tool of interpretation is recognized and employed to a certain extent. There are cases where both the High Court and Constitutional Court have used the legislative method of interpretation when when solving complicated high profile cases.[78] But, when it comes to the practice of ordinary judges, the interviews showed that the legislative history interpretation method is used in their work practice. Furthermore, judges showed reluctance about the relevance of legal reports prepared by the Parliament

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[74] Interview with a Judge at the Appellate Court in Shkoder, ALBJCINT2021-1

[75] *Interview with a Judge at the Appellate Court in Shkoder, ALBJCINT2021-1; Interview with a former Judge of the Supreme Court, ALBJCINT 2021-3*

[76] Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5

[77] *The authentic interpretation, for the first time was provided in the Basic Statute of the Republic in 1925, where Article 14 provided that this interpretation was exercised by the joint meeting of the two chambers (the Chamber of Deputies and the Senate). The next constitutional act, the Basic Statute of the Monarchy of 1928, also retained this power of the parliament. The authentic interpretation was an important instrument during the communist system, envisaged in Article 58, point 3 of the Statute of the People's Republic and also later in article 67 of the 1976 Constitution.*

[78] The CC at least in one decision has stated that "*the justifying reports that accompany a draft law or a proposal for a law, which are submitted to the legislator for approval… are of great importance, because they serve as basis [of interpretation] and are an aid to the judge and scholar, in understanding the spirit and content of a law or a particular provision of it, when it is vague, equivocal or contradictory. These reports reflect: the cause, object and purpose of the law, summarized in a single term "ratio legis*" CC Decision No.57/97; The CC often in its decision refers to the travaux préparatoires of the Parliamentary Commission for the Drafting of the Constitution, published by OSCE to explain the meaning or goals of certain provision. See CC Decision no.1 date 12.1.2011.

when adopting laws, claiming that they lack the proper quality and usually do not serve the judges at all.[79] Judges find the reports of the Parliament and the minutes of the specific parliamentary commission where an act is discussed irrelevant, concentrated more on the political debate, rather than explaining the telos of the act. Also, some judges even said that they were not aware of how to download or where to find these reports.

The relationship of the judges with the law as described above is similar with other post-communist countries. Much like in other post-communist countries, there is a tendency in Albania to decide cases in a clear-cut analytical exercise of mechanical matching of facts with the applicable law.[80] There is a preference for literal, grammatical and logical interpretation compared with other methods such as teleological, functional or systemic interpretation.[81] The last methods are considered as subsidiary methods of interpretation employed only if the literal interpretation fails.[82] The majority of judges tend to apply the black letter of the law, rather than engage in a process of elaboration of the legal norm, teleological interpretation or policy/law making. The style of judicial argumentation is characterized by the application of the formal law to the concrete facts, despite the extent to which the outcome of the judicial process is logical, just or fair. Regrettably, this problem was even noticed in decisions of High Courts. That is why the Constitutional Court in some of its decisions has settled standards on how judges should be careful in reasoning their own opinions and that the application of the law should be logical, otherwise it infringes the right of the parties for a due process of law.[83]

We wanted to find out how judges perceived the legacy of the communist system and whether formalism and literal interpretation are somehow inherited from the past. Surprisingly, most of the interviewees did not view the judges' current approach to the law as a remnant of the communist system. They all stated that the number of judges in the judicial system who worked during communism is insignificant. Actually, the majority of the judicial troupe is composed of new judges educated in the magistrate school and the communist past does not have a specific direct influence in the way of their decision-making. However, there were interviewees who stated that the communist period affected

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79 Judges mentioned also that there are even exceptions. For instance the report of the Parliament for specific changes in the Criminal Code which introduced the concept of preliminary judge are written by experts attached to the Parliament, and today almost every judge cites and uses these reports when in their decision explaining the duties of preliminary judge.

80 Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non) Transformation fq3; See Rodin, Siniša. "Discourse and authority in European and post-communist legal culture." *Croatian Yearbook of European Law & Policy* 1, no. 1 (2005): 1-22. Ćapeta, Tamara. "Courts, legal culture and EU enlargement." *Croatian Yearbook of European law & Policy* 1, no. 1 (2005): 23-53.

81 Manko, R., 2013. Survival of the Socialist Legal Tradition: A Polish Perspective. *Comp. L. Rev*., 4, p.1.pg.6; Mańko R. 'Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome', *Pólemos: Journal of Law, Literature and Culture* 7.2 (2013): 207-233, 218-226

82 Ibid.

83 CC Decision 38/2011

the understanding of independence,[84] or stopped the normal development of the country, thereby indirectly influencing the status of the judiciary today. Rather than the communist period, the judges and lawyers interviewed linked the approach towards formalism to the working conditions of judges, fear of disciplinary proceeding, education or other extraneous reasons. For instance, judges stated that the big number of cases assigned to each judge and the legal deadlines for timely submission of the cases press judges to finish a case as soon as possible, which does not leave them enough time to properly reason an opinion. Delays in the submission of reasoned opinions is also an element in the evaluation of judges and systematic delays can lead to disciplinary proceedings. As a consequence, judges have little time to read, research the practice of other courts, engage in comparative analysis and check alternative resources. Moreover, judges do have also other forms of self-constrains related to the reaction of the parties. As one of the interviewees pointed out, since the judicial system is perceived as highly corrupted, a judge who goes beyond the black letter of the law might be prejudiced that he/she decided to go beyond the law because he/she had received a bribe.[85]

The frequent changes in the legislation and especially the bylaws push them towards a direct application of the law and discourage them from engaging more into interpretation.[86] As one of the interviews stated "*You have taken time to consider the judicial practice and come with an opinion on how the law should be read and immediately after you have done this, you read in the Center for Official Publication that the law has changed…*[87].

The importance of legal education was mentioned almost by all the interviewees as one of the factors that influence the capacity of judges in developing law. They mentioned different aspects of legal education. Firstly, the curricula and teaching materials of the Law Faculty should provide students with practical skills[88] and thorough knowledge of the jurisprudence in order to avoid the repetition of core knowledge in the Magistrate School[89]. In this regard, one of the interviewees also suggested a common meeting between the Magistrate School and the Law Faculties to improve the curricula according to the needs of judges and prosecutors[89]. Interviewees strongly appreciated the contribution that the Magistrate School gives in the continuous academic education of judges "especially in relation

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84 Interview with a Professor of Constitutional Law, University of Tirana ALBJCINT 2021-8
85 Interview, ALBJCINT 2021-8 ibid.
86 Interview with a Judge from the District Court of Shkodra, ALBJCINT 2021-7, Interview with a Judge of Administrative Court in Tirana, ALBJCINT2021-11, Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5
87 Interview with a Judge from the District Court of Shkodra, ALBJCINT 2021-7
88 Interview with a Judge from the District Court of Shkodra, ALBJCINT 2021-7
89 Interview with a Judge of the Appellate Court of Vlora, ALBJCINT 2021-4;
90 Interview with a Professor of Constitutional Law, University of Tirana, ALBJCINT 2021-8

with the frequent changes in the legislation".[91] However, as stated by one judge, although the participation in the continuous training is a legal obligation for judges and prosecutors, they should not turn into a formal instrument.[92] It is necessary that the curricula of the Magistrate School, as well as the continuous courses for judges be directed to concrete solution of cases in court.[93] Apart from the legal education, there were interviewees that mentioned the importance of literature in helping judges to better interpret legal norms and open legal debates that would eventually further the development of the law. Judges complained that there were very few pieces of academic literature commenting on the court's jurisprudence.[94] They also called for the contribution of the academia to publish commentaries or collection of courts decisions for different legal institutes, which would help judges in their interpretation of the law.

Lastly, the personal dimension is also a vital component in the approach of judges towards the law. Capacity and openness to continuous learning, courage to challenge what they consider unfair, personal integrity, self-control, high sense of responsibility over the given power, ability to work under pressure and writing skills were identified during the interviews as some of the features that shape the way judges work, apply or interpret the law.

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91 Interview with a Judge at the Appellate Court in Shkoder, ALBJCINT2021-1.
92 Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5
93 Interview with a Judge of District Court of Tirana, ALBJCINT 2021-5
94 Interview with a Judge of the District Court of Tirana, ALBJCINT 2021-6

5. THE ROLE OF THE CONSTITUTIONAL COURT IN DEVELOPING THE LAW

The Constitutional Court of Albania was initially established in 1992 with the Law On the Main Constitutional Provision. Although relatively young, this Court enjoys a good reputation in the country and has been authoritative in setting important principles for the judiciary in Albania, especially its independence and impartiality. With regard to the role of the Constitutional court in developing the law, we have different rulings that range from judicial activism to judicial self-restraint and legal positivism. On the one hand, the Constitutional Court has considered the Constitution as a living instrument and has said that the Constitutional Court in its interpretation should take into evaluation the evolution of the country and "*guarantee* ***that the new values, which were probably not in the attention of the drafters*** *of the Constitution, would receive dignity, recognition and, above all, constitutional protection.*"[95] Thus, the CC has given itself the right to go beyond the legal provision as written in the law and acknowledged its role as a positive lawmaker. In this perspective, we can detect decisions of the CC where it has read a legal provision differently and much more broadly than the drafters[96], cases where it has oriented the legislator how to write a specific provision in the future[97] and at least one case where it has stricken down a legal provision as unconstitutional and wrote the new text of the provision itself.[98]

However, after the adoption of the 1998 Constitution, the CC began to state that it is not a "norm- creator: and shall not act as a positive legislator. The Court has said that the task of the Constitutional Court is not to put itself in the role of a positive legislator, but to check whether the solution given by the legislator is in accordance with the provisions of the Constitution.[99] This self-restrain of the CC went too far when the CC has refused to rule on the legislative omission and considered these cases out of its jurisdiction.[100] According to the CC "***the Interpretation, as a function and method, takes place when there is an existing norm, when there is ambiguity in its meaning and the CC should not fill the [legal] gap, because otherwise the Constitutional Court would be put in the wrong position of the creator of the legal norm, a function that, as we know, belongs to the legislator***."[101,102]

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[95] CC Decision no. 20, date 01.06.2011 the
[96] CC Decision 1/1995
[97] CC Decision 5/92
[98] CC Decision 6/992
[99] CC Decision no.1, date 7.01.2005; CC Decision no.24 date 9.6.2011; CC Decision no. 75, date 19.04.2002 CC Decision no.3, date 23.02.1995
[100] The CC has initially determined that in the absence of an express constitutional provisions, the Constitutional Court has no jurisdiction to consider issues of legislative omission. In these situations, the Constitutional Court has generally recommended to the Parliament to fill the legal gap.Sadushi, Sokol, "*Drejtësia kushtetuese në zhvillim*", Shtëpia Botuese "Toena", Tiranë 2012, fq.242. See also CC Decision nr.43, datë 18.5.2001
[101] Decision no. 75, date 19.04.2002
[102] CC Decision no.24, date 9.6.2011

This standing of the CC is not without critics. The lack of legal regulation can lead to violations of fundamental human rights and freedoms. It can also lead to shortcomings in the functioning of the rule of law and the principle of checks and balances. For this reason, some constitutional courts consider issues related to legislative omission as part of the constitutional jurisdiction. On the other hand, there are cases when the legal omission makes another provision unconstitutional and that is why there are authors who acknowledge the need of a judicial review of the legal omission.

These have been the considerations that compelled the CC to change its position with regard to legal omission in 2011.[103] However, it should be noted that this was a case of relative omission rather than absolute omission and the jurisprudence is not yet consistent in this regard.

5.1 The legal status of the Constitutional provisions

The Constitution Court has been progressive in interpreting the status of the Constitution and the international agreements as authoritative sources of law. The CC has acknowledged that the Constitutional provisions are directly applicable[104]. The Constitutional Court has clarified that the High Court and other ordinary courts can interpret the Constitution independently and this is a matter under their own jurisdiction.[105] Moreover, the CC has encouraged the use of *conforming interpretation* with the Constitutional provisions.[106] The CC has stated that in cases where there are several interpretations of the legal norm and one of them is in accordance with the constitutional provision, the judge should choose the interpretation which is in conformity with the Constitution in order to "save" this legal provision.[107] As such, the conforming interpretation can be considered to be a form of judicial self-restrain imposed on the judges and they should not avoid or neglect to conform their interpretation to the Constitution when this is possible. This limitation is also seen in the procedures for starting a preliminary ruling, where the judge should have exhausted the possibility of conforming interpretation before the Constitutional court.[108]

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[103] Carlassare, Lorenza. "Interlocutory Review–Abstract Review." *Science and Technique of Democracy No. 15: The Protection of Fundamental Rights by the Constitutional Court* 124.1998, pg. 134.
[104] See further CC Decision no. 8 date 08.03.2013; CC Decision no. 35, date 10.10.2007. CC Decision. 25, date 05.12.2008; CC Decision no. 20, date 01.06.2011; CC Decision no. 22 date 24.04.2015
[105] However, it has made it clear and stated in different decision that it is the CC that has the right of the final interpretation of the Constitution. See CC decision no. 13, date 12.07.2004.
[106] CC Decision *no.29, date 31.05.2010*, CC Decision.*30, date 17.06.2010*; CC Decision.*26, date 13.06.2011*; CC Decision *5, date 16.02.2012*
[107] More specifically, this methodology has been clarified by the CC in its decision no.29, date 31.5.2010
[108] See Pirdeni, Adea. "Aksesi në Gjykimin Kushtetues: Subjektet, Legjitimimi dhe Interesi Para Gjykatës Kushtetuese të Republikës së Shqipërisë", PhD Disertation, University of Tirana October 2016, pg.134

5.2 The application of international law

The Constitution of Albania has opted for a monist system with regards to the reception of international law in the domestic legal order. Article 5 of the Albanian Constitution provides that the Republic of Albania apply *the international law that is binding upon it"*[109]. Article 122(2) provides for the supremacy of the *international agreements ratified by law over the domestic law that is not in compatible with it*." Article 122(1) guarantees that the ratified international agreements are directly applicable, except when they are not self-executing and their application requires the adoption of a law. Thus, the Constitution grants special status to international law, both supremacy over the domestic legal order and *direct applicability*, provided that certain conditions are met. However, the CC has failed to interpret the term self-executing international agreement, provided in article 122 of the Constitution. According to the CC, the interpretation of the constitutional concept of self-executed international agreements that have precedence over domestic law that do not comply with it is in the jurisdiction the ordinary court/ High Court, which has in its final solution of the concrete issue.[110]

A special status is given to the ECHR by our Constitution, raising it at the constitutional level in cases of restriction of fundamental rights. Albanian judges of the ordinary judicial system, particularly those of the higher level and Constitutional Court, consistently refer to the jurisprudence of the European Court of Human Rights[111]. From a research we conducted in the framework of this research, the CC form 1999-2017 has referred to the ECHR more than 446 times and to the ECtHR jurisprudence more than in 270 decisions. Furthermore, the CC jurisprudence has acknowledged a doctrine of direct application of the ECtHR decision. In its ruling 20/2011 the CC has stated that *"the European Court of Human Rights has in our legal system an exclusive competence. This competence is accepted by our internal legal system, for the purpose of implementing Article 122 of the Constitution, as well as Article 17/2 thereof, which bring as an obligation that the decisions of the European Court of Human Rights should be directly implemented."*[112]

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[109] For more on the monist system of the relationship between the international and national regime see Arben Puto, *E Drejta Ndërkombëtare* Publike, Botimet Dudaj, 2010, Ksenofon Krisafi, *Kushtetuta Shqiptare dhe e Drejta Ndërkombëtare*, Buletini Posaçëm, "5 Vjet Kushtetutë" BOTIMPEX, Tiranë, 2004.

[110] CC Decision no. 21, date 29.04.2010(V – 21/10)

[111] Caka, Fjoralba and Alimehmeti Evis. *The Relationship between International and Domestic Law in the Albanian Legal System*" In Mezzetti, Luca, Carna Pistan, Alessandra Di Martino, Francesca Polacchini, and Justin O. Frosini. *International constitutional law*. G Giappichelli Editore, 2015. Alimehmeti, Evis, Caka, Fjoralba- Reflektime mbi zbatimin e të drejtës së Bashkimit Evropian në fazën e para- anëtarësimit të vendeve kandidate, në perspektivën e Shqipërisë dhe vendeve të rajonit, Jeta Juridike 3. Shtator 2015

[112] CC Decision no. 20, datë 01.06.2011, (V – 20/11). CC Decision. 20, datë 01.06.2011. In Decision no.16, date 17.04.2000, the CC acknowledged that Article 1, Protocol 1 of the ECHR is directly applicable.

Moreover, during the interviews there were mentions and references to positive cases of direct application of the ECHR and its jurisprudence, the SAA, the Aarhus Convention, the European Convention on Extraditions. From the data collected, judges apply the international agreements directly when:

- The law implementing an international agreement has translation flaws, lacks clarity, or has a vacuum. The typical referred case here was the Convention on Extradition, due to problems of translation in the Code of Criminal Procedures.[113]
- The international agreement provides for a procedural right/locus standi before the national court, which is not recognized in the internal legal order. The case referred by at least two judges was the Arhus Convention, which *provides the right of every individual to challenge a normative act in the field of environment*." [114]
- The (bilateral) international agreement ratified by Albania gives more rights than granted by the domestic laws. One of the judges shared with us a case where the exemption for the payment of a certain tax was provided in the bilateral agreement between Albania and Republic of Italy.
- Through the Stabilization and Association Agreement, when the directive translated/ transposed in the domestic legal order has flaws, errors.[115]
- Cases that are similar to cases elaborated in the jurisprudence of ECHR.

However, the above mentioned cases are rather exceptions than the norm . In most of the cases international law in Albania is used as an additional argument to support the solution of a conflict by applying domestic law, thus as a secondary resource. Even in cases where the domestic law applied is derived by an international agreement ratified by Albania, the legal basis for solving the case was the domestic law implementing the international agreement, or other national legal resources.

On the other hand, at least three judges mentioned that there were cases when other resources beside the law were used in an abusive manner. They pointed out that there is a tendency to write very long decisions, by citing the national law and copy-pasting all the international documents, or passages from the European courts, or foreign courts, but without doing a proper analysis or interpretation of these resources. In this way national courts utilize the international law as an "external source of legitimacy", either to escape a proper reasoning in a complex case, or when ruling on those issues which could potentially evoke the greatest response from the public and government.[116] The last is particularly observed in cases for defamation against politicians, where the courts, including the highest court turn to the jurisprudence of the ECHR to justify the outcome of their decision.

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[113] Interview with a Judge of the District Court of Tirana, ALBJCINT 2021-6
[114] Interview with a former Judge of the Supreme Court, ALBJCINT 2021-3
[115] Interview with a Judge of the Appellate Court of Vlora, ALBJCINT 2021-4
[116] Koslosky, Daniel Ryan, cit. supra, pg. 254

5.3 The preliminary ruling procedure

The preliminary ruling procedure is provided in Article 145(2) of the Albanian Constitution. According to this article, judges can suspend proceedings and send a case for interpretation to the Constitutional Court when they find that a law is not compatible with the Constitution.[117] In order to start a preliminary proceeding, it is necessary to establish a direct link between the law and the solution of the case at hand[118]. Looking at the statistics of preliminary ruling procedures initiated before the CC, we understand that the preliminary ruling is not the most used instrument to challenge the constitutionality of a legal norm. They make around 6% of the cases submitted to the CC and 70% of the cases submitted by preliminary ruling are rejected by the Constitutional Court.

Year	Total number of cases	Requests for preliminary ruling	Requests admitted	Requests rejected
2009	32	1	1	0
2010	38	6	2	4
2011	53	3	3	0
2012	60	1	0	1
2013	55	4	1	3
2014	60	1	1	0
2015	83	7	1	6
2016	89	7	1	6
2017	90	4	1	3
2018	15	1	0	1
2019				
2020				
2021	30	3	1	2
Total	**605**	**38**	**12**	**26**

Note: *During 2019 and 2020 the activity was suspended and the CC has not delivered any decision, since justices were removed by the Vetting bodies.*

[117] 2. When judges find that a law comes into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the case to the Constitutional Court. Decisions of the Constitutional Court are obligatory for all courts" A more detailed regulation of the preliminary ruling proceedings is stipulated in Article 68-70 of the Law on the Organization and Functioning of the Constitutional Court. Law No.8577, date 10.2.2000, "Law on the Organization and Functioning of the Constitutional Court", amended by Law No. 99/2016, "For Some Changes and aditions to the Law on the Organization and Functioning of the Constitutional Court."

[118] Article 68(1) of the Law on the Organization and Functioning of the Constitutional Court.

The interviews have informed us that there is a certain hesitation from judges to start this procedure. Judges shared with us that writing a preliminary request for the CC is a process that asks for much elaboration, research, legal arguments, and it is very disappointing when the CC rejects the request for preliminary ruling saying that there is no constitutional reason to be accepted.[119] On the other hand, the CC has raised the bar for adjudicating a case through preliminary ruling, by setting different criteria to legitimize a judge ratione materia[120]. The CC requires that the judge give serious grounds on the unconstitutionality of the legal norm, referring to constitutional principles and provisions, express his conviction that he cannot resolve the case without the CC opinion and prove that he has made every effort to interpret the law in accordance with the Constitution.

The setting of criteria for preliminary ruling by the Constitutional Court is a good standard, because it orients the ordinary courts on the requirements that need to be fulfilled to have their request accepted by the CC. It also is in line with the principle of the economy of the court, since it prevents the judges from importing cases to the CC for futile reasons. It serves to the citizens a fast court procedure because it discourages judges to suspend the proceedings just because they have a mere academic curiosity on the compatibility of the legal norm with the Constitution. Nevertheless, the CC should be careful when striking down the request for preliminary rulings sent by judges. This instrument is particularly important to build dialog and communication between the courts. The preliminary ruling is a setting that not only filters the unconstitutional provisions and protects individuals, but also contributes to the development of law.

[119] Interview with a Judge of the Appellate Court of Durres, ALBJCINT2021-2
[120] Pirderni, Adea, cit.supra, pg. 134-150.

6. CONCLUSION AND RECOMMENDATIONS

There is little scholarship in Albania on how judges work, their attitude towards law and their role in the society. Observing and analyzing the judges' belief system, knowledge, and their shared value, is more than an academic curiosity to break the "cloak of secrecy" of professionals- which for the sake of preserving impartiality and independence tend to self-isolate; it is an attempt to understand what influences judges in the bench and how they apply the law. Judicial decision-making can be a direct outcome of judicial 'role perception' as it relates to their general position in society. The way in which a judge conceives his role is a significant factor in the entire decision-making process. Judges who considered themselves bound by the law will tend to stick more to literal interpretation and formalism. On the other hand, judges who perceive their role in the society as lawmakers will employ other methods of interpretation and have a wider view on the concept of law. Therefore, further analyses on the role of judges in developing law and judges' approach towards law are needed.

The findings in this research showed that not all the judges in Albania embrace their role as actors who develop the law. Most judges in their everyday work apply the law rather than engage in interpretation. The interpretation of laws is seen as a subsidiary function that is called into action when the prior and main function- i.e. the application of the law is not possible. Judges do not pass moral values in their decisions or display any internal considerations they balanced in the decision making process. Judges consider themselves bound by the law and by law they refer to the formal acts of the Parliament. The usage of other resources such as international agreements, doctrine, comparative analysis is not usually employed by judges. The relationship of Albanian judges with the law is remarkably similar to other CEE post-communist countries. Much like other post-communist countries, even in Albania there is a tendency to decide cases in a clear-cut analytical exercise of matching facts with the applicable law. There is a preference for literal, grammatical and logical interpretation compared with other methods such as teleological, functional or systemic interpretation.

There are some factors that lead judges towards self-constrain by limiting their creativity. One of these factors is a lack of independence and fear for their own status. External independence is the first premise for having a judge who can freely play his role of rendering justice. When judges perceive

that the executive is controlling them, they tend to go towards formalism, glorify the Law as the will of the majority, hesitate to strike down acts of the Government and align as much as possible with their public policies. Formalism is also seen as a shield against probable future menaces by the government, since being bound by the law is perceived as equal to being right. On the other hand, the legal framework and independence is not the only factor to influence judges and their role in the society. Judges should have the time, space, and resources to engage into a creative and intellectual reading of the law. The high number of cases, the frequent changes in the legislation, the lack of properly instructed/educated clerks, the pressure to reason a decision on time influence judges in their approach to law in their everyday life, since they perceive as a success the quantity of decision delivered and "case-evasion", rather the quality of justice. Moreover, the legal education should be driven more towards caselaw and practice rather than doctrinal, comparative knowledge. The continuous education of judges in the obligatory Magistrate School is at risk of turning into a formal instrument if judges do not seriously engage and contribute by sharing their questions on law and judicial practice.

Based on the findings of the paper, the authors would propose the following recommendations:

- Avoid continuous changes in legislation with regard to the legislation affecting the status of judges. Interpretation of law is an intellectual activity and judges need to have sufficient time and the necessary space to engage in this process and render justice independently and impartially.

- There is a need to increase the number of advisors and improve their selection process and their professional skills, reduce the working hours per judge and restructure the distribution of cases. Judges should have more time and quality assistance in conducting the necessary research for the judicial cases.

- Increase the participation of judges in national/regional/international networks to strengthen their knowledge on European legislation, practices and international agreements, their scope and method of application in the domestic legal system.

- Increase the budget for regional and international trainings for judges. The participation of judges in Albania on courses/trainings organized in EU countries or the Western Balkans region rests solemnly on personal budget and personal efforts of judges.

- Continuous trainings on communication and writing skills (soft skills) for judges. Communication skills among judges are important to foster their constructive debates when they judge in plenaries, as well as to strengthen their cooperation within the judicial associations. More specifically, this would be essential for successfully writing requests for preliminary ruling at the Constitutional Court.

- Establishment of electronic databases on the jurisprudence of the High and Constitutional Courts, where judges and clerks can easily find a decision based on a key word, legal basis or parties, similar with the databases of HUDOC or CURIA, shall enhance the uniform and proper application of the law.

- A technical solution for the anonymization of ordinary court decisions for the purpose of respecting the privacy of the parties, and provision of unhindered access of the ordinary court to their peers' decisions should be found.

- More academic publications and (qualitative) analyses of the High, Constitutional and European court's decision are needed. Collection of cases, commentaries, scholarly articles on specific legal institutes shall facilitate the work of judges in interpreting and developing the law.

- Develop special trainings with media-judges and the PR officers in court with regards to the influence of media pressure and public opinion in judicial reasoning. Media officers in courts need to have a procative response with regards to information on court rulings, especially in salient cases, and contribute in improving the communication of the courts with the general public.

- The Strategy of Legal Education of the Public 2019-2023, approved by decision 47/2019 of the Parliament and its Action Plan should include special curricula and activities for different target groups on the understanding of the independence and impartiality of judges.

Information about the project

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

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

Information about IDSCS

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

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