

## **LINKAGE BETWEEN INDEPENDENCE OF JUDICIARY SYSTEM AND HUMAN RIGHTS, ALBANIA'S CASE**

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**ABSTRACT:** *Principle of separation of powers is reflected in albanian constitutional system. There are intense debates among constitutionalists about recent developments of this principle. Tripartite system of separation of powers lies in the prediction of independence of judiciary system. Independence of judiciary system is a legal requirement, a core principle of rule of law, a human right guaranteed by democratic constitutions all over the world and as well as a means to enjoy other human rights. Albanian Judiciary System has made limited progress toward independence and impartiality. Regarding legal framework, Albania adopted essential set of laws, even that there are some laws passed by legislative bodies which according to Constitutional Court Verdicts are unconstitutional and violate independence of judiciary system. Another debatable issue it is the composition of High Council of Justice, membership of President of Republic and Minister of Justice. Two parallel inspectorates as Inspectorate of Ministry of Justice and Inspectorate of High Council of Justice overlap each other competences and undermine judiciary independence and intimidate judges. The main research question is about the linkage between independence and impartiality judiciary system and human rights. Dealing with laws ensuring independence, as well as with some legal provisions violating it we will reach into important conclusions.*

**KEYWORDS:** Independence, Impartiality, Judiciary system, Human Rights

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### **INTRODUCTION**

The path towards independent and impartial judiciary in Albania has made limited progress. There are laws passed by legislative bodies which violate independence and impartiality, as well as high level of corruption, low public trust and political or illegal influence over courts and judges that seriously undermine independence. At constitutional level, article 7 of Albanian Constitution (hereinafter Constitution) stipulates the principle of separation of powers in Republic of Albania. Furthermore on judicial power Article 135 stipulates "The judicial power is exercised by the Supreme Court and appellate courts and courts of first instance, which are established by law. " Regarding the organization of this power it is important identifying judiciary system as not centrally organized. This means that every court shall consider specific issues in complete independence and uninfluenced as by a higher court or the court of the same level. The Court does not work on the basis of orders, but on the understanding of the internal panel, formed by analysis of all the evidence reviewed in a court hearing in relation to the Constitution and the law. The power is exercised scalable, under the principle of control decisions from lower courts to higher courts. Furthermore the Constitution, in its articles (article 145/1) stipulates "Judges are independent and subject only to the Constitution and laws. " Interpreting article 7 of the Constitution and the article 145/1 it is clear that the Albanian Constitution predicts independence of the

judiciary as well as the independence of judges itself. Judges are forced to give court's verdicts in compliance with the constitution, laws and administered evidence in the judicial process as well as their internal beliefs, so called the discretionary power. None of the subjects of law, institutions or other authorities can interfere with the courts or the judges as under Article 145/3 interference in the activity of the courts or the judges entails liability under constitutional law. As we mentioned before, the Constitution force judges to obey the constitution and the law, but what happens if judges find that the applicable law contradicts the Constitution. According to article 145/2 of the Constitution of the Republic of Albania if judges find that the law contradicts the constitution, they do not apply it. In this case, they suspend the proceedings and send the issue to the Constitutional Court. The linkage between human rights and independence of judiciary is clear under the article 42 provisions where the constitutional stipulates: "The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."

## LITERATURE

Linkage between independence and impartiality of judiciary system and human rights is a legal research. Constitution of the Republic of Albania ,Law No. 9877 dated 18 February 2008 "On the Organization of the Judiciary in the Republic of Albania", Law no.8811, dated 17.05.2001 "On the organization and functioning of High Council of Justice" amended by Law No.9448 dated 05.12.2005 and the Law "On the organization and functioning of High Council of Justice", European Convention of Human Rights, International Covenant on Civil and Political Rights, Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) and European Charter on the Statute for Judges are some of the most important legal instruments ensuring independence in every single state, in all European countries and further more. Jurisprudence of Constitutional Court of Albania is a valuable source since it elaborates the independence and impartiality principles. From an other point of view the jurisprudence (Albanian Constitutional Court Decision no.11, dated 02.04.2008; Decision no.29, dated 30.04.2001; Decision no.14, dated 22.05.2006; Decision no.20, dated 09.07.2009) makes clear that laws violating independence could not be applied in a democratic country. Judgements, sometimes pilot-judgements of European Court of Human Rights found Republic of Albania has violated article 6 of European Convention of Human Rights in several cases, violating other human rights as well. This cases represent the linkage between them :as a fundamental human right itself and as a means of enjoyment other human rights as well. Decisions of the European Court of Human Rights, referred in this research, constitute not only an illustration and elaboration of the right to a fair trial, as provided in Article 6 of the Convention but also constitute the determination of the states to ensure this right and other rights strongly linked it not only through internal judicial system but also by the European Court.

## METHODOLOGY

Author decides to use qualitative methods, analysing, interpretation legal framework appropriate for the topic as well as analysing the judgement of Constitutional Court of Republic of Albania and European Court of Human Rights Judgements against Albania. Some statistical dates of European Commission, Progress-Report ,Year 2013 wil be used as well.

## RESULTS/FINDINGS

This study was influenced by a number of factors. Mostly, the illegal and political influence was found in numerous debates on the judiciary, its independence and impartiality accompanied by low public trust. Actors of the judiciary system see problems of judiciary system into legal provisions, their dependency on politics and other powers. Almost all judges involved in disciplinary proceedings connect initiation of disciplinary proceeding with their political beliefs. Citizens complain about the judiciary showing lack of trust in a fair trial. They connect the decisions with the ability to pay and the influence of winner party. Public opinion and researchers as well use the terms independent and impartial without making differences between them, even they are two different terms.

## DISCUSSION

### *-Legal definition of operational terms*

Independence: The independence of the judiciary , in a legal overview , is primarily a guarantee deriving from the Constitution of the Republic of Albania .The principle of independence of the judiciary is involved in a number of international documents such as :Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; The European Convention on Human Rights (ECHR); Basic Principles on the Independence of the Judiciary adopted by the Assembly of the UN; Recommendation for independence, efficiency and role of judges adopted by the Committee of Ministers of the Council of Europe; Universal Charter of the Judge, etc. The jurisprudence of the Constitutional Court of the Republic of Albania, in respect of the implementation of the principle of separation and balance of powers and the principle of rule of law, emphasized that judicial independence must be understood as essential independence (right of courts to award the impartially and without being influenced by the interests of any other branch of government) and structural independence, which requires the provision in the Constitution of the institution that realizes the appointment and removal of judges. The organizational and financial independence is part of structural independence as well. Independence of judiciary system is strongly linked to human rights protection. Protection of human rights is a standard and a criteria in evaluating the independence of judges and courts.

Impartiality: In a legal overview impartiality is linked to equality principle between parties, providing the parties an equal opportunity to present their respective cases. Impartiality means the judge has no personal stake in the outcome. Regarding legal framework ensuring impartiality it is the same as independence. Ensuring the

impartiality is not only the responsibility of state. It is the responsibility of judges as well.

Legislation promulgated unconstitutional about some amended law regarding judiciary system in Albania

Several laws passed by the Albanian legislature bodies were declared unconstitutional by the Constitutional Court of the Republic of Albania. Decision no. 11, dated 02.04.2008 Constitutional Court of the Republic of Albania abolished Article 315 of the Criminal Code of the Republic of Albania "Giving an unfair court decision", as incompatible with the Constitution. According to Court's Decisions Article 315 was incompatible with Articles 42 (The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law) and article 145 (Judges are independent and subject only to the Constitution and the laws. If judges believe that a law is unconstitutional, they do not apply it. In this case, they suspend the proceedings and send the question to the Constitutional Court. Decisions of the Constitutional Court are binding on all courts. Interference in the activity of the courts or of the judges entails liability according to law.)

Among others, the court held that the possibility of initiation a criminal prosecution against a judge for the issuance of a final decision, while the decision can be reviewed by a higher court, creates an inappropriate pressure, which could violate giving-justice process. The abolished article, article 315 of the Criminal Code of the Republic of Albania undermines the independence of judiciary system.

Another decision of the Constitutional Court of the Republic of Albania, Decision No.14, dated 05.22.2006 Constitutional Court decided to accept the complaints of unconstitutionality of the article 2,3,4,5 and 6 of the Law no. 9448, dated 05.12.2005 "On amendments and additions to Law no. 8811, dated 17.05.2001 "On the organization and functioning of the High Council of Justice" and rejected the unconstitutionality complaint for Article 1 of this law. Article 1 is found in accordance with the Constitution. This article sanctions that the members of the High Council of Justice elected by the Assembly should not be judges. One of the arguments of Constitutional Court was that the law cannot predict additional provisions for matters which the Constitution treats in an exhaustive way. Amended of Law No. 9877 were promulgated unconstitutional, exactly Article 38, paragraph "a" of the law No.9877 sanctioned: "Chancellor appoints and removes the court secretarial staff and administrative, technical staff of the court services. "According to the principle of separation of powers and check and balance principle, the Court considers that the competence of the chancellor in appointing and removing the administrative and technical staff impacts and enables financial management. The chancellor's competence to appoint and remove the staff of the finance sector, avoiding the chairman of the court, puts this sector directly subordinated to him. Consequently, this arrangement is contrary to Article 144 of the Constitution, under which courts administer their own budget (Article 40/1 of the Law No.9877).

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These verdicts of CC, but not limited to them, represent jurisprudence of CC regarding independence of judiciary system. Even that, they represent a negative aspect, which means they represent cases in which legislative has attempted to limit the independence of judiciary system through legal changes.

### **The relationship of the judiciary with other powers**

#### **High Council of Justice**

High Council of Justice or analogous institutions are recognized as the basic element for the rule of law in order to achieve the balance between the powers according to Opinion no.10(2007) of the Consultative Council of European Judges (CCJE). In Article 147 of the Constitution of the Republic of Albania is sanctioned that the High Council of Justice consists of the President of the Republic, Chairman of the Supreme Court, Minister of Justice, 3 members elected by the Assembly, and 9 judges of all levels, elected by the National Judicial Conference. Article 1 of Law no. 8811, dated 17.05.2001 "On the organization and functioning of the High Council of Justice" amended with the law no.9448, dated 5.12.2005 sanctions HCJ is an institution with several functions including the appointment of judges, transfer of judges, periodic evaluation of judges, investigating complaints against extra judicial activities of judges, disciplinary and dismissal of judges. The Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) encouraged states that the High Council of Justice to perform both functions : competences for appointment of judges and evaluation of the judiciary and competences for management and budget matters.

Almost all agree on the role and necessity of HJC in guarantying the independence of judiciary system, the composition of it is a debatable issue. Law no.8811, dated 17.5.2001 amended by Law Nr.9448, dated 05.12.2005 stipulates in Article 11.1 that the President of the Republic is the Chairman of the High Council of Justice. This provision is debatable because it is not in accordance with provisions of Opinion no.10 (2007) of Council of Europe. According to the Opinion : "Prospective members of the Council for the Judiciary, whether judges or non-judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area. An other high interest issue it is the membership of Minister of Justice in HJC. It is arguable if he as part of executive power guarantees or undermines independence of judiciary system. Still, according to Opinion's predictions about the composition of HJC, the Minister's of Justice role appears especially in the disciplinary proceedings against judges. These can not be carried out without the active participation of the Minister of Justice, and their appointment can not be made without the approval of the Chairman of the Council, that because of the function, is the President of the Republic. The Constitution gave the President the chairmanship of the High Council of Justice, the fact that the Head of State can exercise better than anyone else because his function is lined with prestige and position.

*HCJ is debatable as mentioned above because of :*

Chairmanship of President of Republic.

Membership of Ministry of Justice while he is part of executive bodies, before this government part of legislative bodies as well.



Overlapped competences between High Council of Justice Inspectorate and Ministry of Justice Inspectorate. According to Albanian legislation, exactly article 16 of the law “On the High Council of Justice” there are sanctioned High Council of Justice Inspectorate’s duties. The article 16,1st paragraph sanctions that the High Council of Justice Inspectorate verifies or sends to the Minister of Justice complaints of citizens and other subjects addressed to the HCJ for judges actions contrary to their duty.

### **Independence of judiciary system as a human right issue**

Many scholars see the independence and impartiality of the judiciary as an issue closely linked to human rights. There is drawing much more attention to human rights nowadays. The linkage between independence, impartiality of judiciary system and human rights lies on :

1. It is itself a fundamental human rights as set out in international human rights norms and domestic norms on human rights. Numerous international legal instrument are designed to protect human rights as: Right to justice; right to a fair trial, independent, impartial and established by law; equality before the law etc.
2. It is a means to protect and enjoy other human rights because when a right is violated access to justice is of fundamental importance; I independence of judiciary is essential to ensure protecting of other human rights known by Constitution or by law. It guarantees that legal acts are compatible with the constitution and that executive acts do not violate human rights. It solves disputes between private parties.
3. Right to access to justice is linked to other fundamental human rights such as right to information, privacy right etc.

Even states are drawing more and more attention on human rights protection, cases of human rights violations still plague the world today. If the implementation of international or national norms is not done voluntarily by the parties, it is the duty of the independent and impartial judiciary to protect human rights violated. Let’s think ...if the judiciary is not independent or impartial. No independent or impartial judiciary does not fulfil its duties and functions but it violates one of the most fundamental human right such as right to a fair trial ,and other human rights once violated before. The judicial system in a country is central to the protection of human rights and freedoms. Courts play a major role in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection, that perpetrators of human rights violations are brought to justice and that anyone suspected of a criminal offence receives a fair trial according to international standards according to International Commission of Jurists(2007).The judicial system is an essential check and balance on the other branches of government, ensuring that laws of the legislative and the acts of the executive comply with international human rights and the rule of law. It is as well important to define the meaning and legal standards of independence and impartiality of judiciary system. Basically it is right to justice, access to justice. Itself it is a principle of rule of law which means:

1. Human Rights must be protected by law (Principle :laws are consistent with international human rights norms and standards. )
2. Disputes about rights must be capable of being submitted to a competent, impartial and independent authority for adjunction (Principle: Laws are equally enforced and independently adjudicated, principle of separation of powers)
3. Authorities, when considering disputes, will apply procedures that will ensure full equality and fairness to all the parties (Principle:Supremacy of law, equality before

the law, accountability to the law, fairness in the application of the law, avoidance of arbitrariness .)

4. Disputes will be determined in accordance with clear, specific and pre-existing laws which are known and openly proclaimed (Principle: governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated...)

A high interest issue are European Court of Human Rights Decisions in cases against Albania. In numerous cases the Court stated that there were violations of human rights, mainly article 6 ,13,and Article 1 of Protocol 1.It is the case Manushaqe Puto and others V Albania where the Court held that it was violation of articles :article 6 (1),violation of article 13 (Right to an effective remedy) and violation of Article 1 of Protocol 1(Protection of property).The case Caush Driza V Albania the ECHR held the same violations as in Manushaqe Puto and others V Albania.The case Laska and Lika V Albania ,a criminal proceeding the ECHR held that there was a violation of article 6 (1).There are other cases as Mullai and others V Albania ,Driza V Albania,Ramadhi and others V Albania ,Shkalla V Albania,Mishgjoni V Albania,Gjonbocari and others V Albania where in pilot-judgement the Court held that there were violations of article 6 and some other articles mainly article 13 and article 1 of Protocol 1. These judgements are a clear example of linkage between independence, impartiality of judiciary system and human rights. The enjoyment of fair trial would not cause violations of other fundamental human rights, mainly property rights. Beyond of these judgements in albanian reality there are much more cases of such violations.

## **IMPLICATION TO RESEARCH AND PRACTICE**

Achieving judicial independence in order to ensure impartiality in judicial decisions is a complex undertaking so in practise, this research is aimed to :

Emphasize the necessity that legislative bodies should draw more attention in evaluating initiatives to legal changes. Legal changes, besides positive effects cannot occur by violating legal certainty. Laws, later declared unconstitutional are negative developments for legislative power and for judiciary as well. Legislative power should not adopt laws which are estimated to affect the independence and impartiality of judiciary power.

The existing gaps between legal provisions and actual situation, as well as linkage between independence and impartiality of judiciary system is intended to increase the attention of policymakers as the lack of independence and impartiality of the judiciary is one of the most serious violations of human rights , reported in all reports regarding human rights in Albania.

Ensuring impartiality or independence of judiciary should have better functioning of the organs of the investigation of criminal offenses in order to investigate and prosecute any person exerting undue influence or corrupted acts over the courts or judges. Number of proceeding is still very low.

Recording of the hearing should be in every court, in every single case, not a project of international actors.

Cases of conflict of interests (expressed or potential) should be treated according to law. Decisions given in conflict of interest are not independent or impartial.

Necessity of an independent inspectorate, not overlapped inspectorates such as Inspectorate of High Council of Justice and Inspectorate of Ministry of Justice, in disciplinary proceeding of judges and evaluating performances as well.

Setting up new standards of treating citizen's complaints. Any complaint should be treated as an eventual human rights violation.

“Recognizing “ decisions of European Court of Human Rights not only for the execution of decisions but treating them as an alarm of judiciary as a violation of human rights in three levels of judiciary.

Addressing remedies for parties of unfair trial and challenging the amount not from state budget but from judge or judges of the case.

It is needed better functioning of High Inspectorate of Declaration of Assets regarding declaration of judges.

## **CONCLUSION**

Guaranteeing the independence of the judiciary in Albania is necessary to handle some legal changes at laws which are estimated that affect or may affect the independence of the judiciary, as well as to adopt new laws. In each single case policy-makers should be involved in the process of legal changes only in cases where this is necessary, and ensuring compliance with the Constitution, law and international acts. Impartiality of the judiciary should receive the same attention as independence because both of them affect public trust in giving-justice process. Reform of the judiciary system is a basic requirement guaranteeing rule of law principles but firstly this reform should be perceived by public opinion and parties to the litigation. Some of main findings of the research are as below:

- The Republic of Albania has the necessary legal framework with the aim of recognizing and guaranteeing the independence of the judiciary as part of the principle of separation and balance of powers as well as a human right issue.
- Apart of legal framework ,it remains controversial and subject of current reform the composition of the High Council of Justice, the composition of the President of the Republic and Minister of Justice.
- Legislative bodies in Republic of Albania has adopted a set of laws for which the Constitutional Court stated that they are not in accordance with the Constitution and violate the principle of independence of the judiciary and judges.
- The right to an independent and impartial judicial power is a constitutional human right deriving from Article 42 of the Constitution of the Republic of Albania.
- Independent and impartial judiciary is closely linked with human rights because besides the fact that the right to an independent and impartial judiciary is a constitutional right, this human right guarantees enjoyment of other human rights recognized by Constitution and law.
- Regarding indigence of judiciary system overlapping competence of Inspectorate of HCJ and Ministry of Justice Inspectorate remain a serious problem while the law on HCJ is not changed.
- Impartiality of the judiciary remains one of the most debatable issues. Trust of public opinion, high levels of corruption, the impact of illegal and political influence are serious breaches of impartiality.



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- Reforming the judiciary in Albania is a basic requirement because absence of independence and impartiality violates human rights, as well as one of the core principles of the rule of law.
- Progress towards independence and impartiality of judiciary is strongly linked to fulfilment of Copenhagen Political Criteria (especially to rule of law principle).

## FUTURE RESEARCH

The judiciary system and linkage between it and human rights will be further studied because :

Judiciary power is a safeguard of democracy and human rights and one of the most important powers. Unconstitutional laws or arbitrary acts of the executive power will be applied if the judicial power would not be independent and impartial. Nowadays it is drawing more attention to human rights .The current reform of the judiciary system in Albania, except engagement cannot produce all the expected effects of it immediately, will have still to be done after that. There is a linkage between judiciary system and a number of institutions and phenomena, institutions such as Parliament, the High Council of Justice, the President, the Ministry of Justice as well as a number of problems such as high levels of corruption, low public trust and political influence. In order balancing them and guaranteeing guarantee the independence and fighting corruption it is required further research in-depth, comprehensive in order to achieve the recommendations and conclusions.

The judiciary system is dealing with high levels of corruption, studies on corruption will treat judiciary as well, as an corrupted power and as a tool in fighting corruption.

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