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An Albanian opposition MP lights smoke bombs during a parliamentary session in Tirana on Dec. 7, 2023.

# A Disastrously Successful Judicial Reform

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n June 2024, Albanians were shocked when anticorruption officials arrested Aurel Zarka, the chief prosecutor of Vlora District, one of the most important in the country. Zarka, who had just weeks before comfortably passed a vetting process intended to rid the judicial branch of criminally compromised prosecutors, was charged with colluding with drug traffickers. Ironically, the vetting process has been a main component of ongoing justice reform in Albania, as was the establishment of the special prosecution unit that ordered Zarka's arrest.

This development showed the two sides of the reform that is still dividing Albanians, almost a decade since its start. Some consider it a failure because of the disruption of due process that it has brought about, while others believe it has started to bring the desired results in fighting

high-level corruption. However, there has been no objective account or analysis of this consequential reform. This essay attempts to highlight some of the main issues in its design and implementation.

## A Noble Undertaking

Albania's justice reform has been promoted by the country's government as a success story. In 2013, the country was plagued by endemic corruption and a weak rule of law that hurt people and stalled European integration. Albania's foreign partners had little to show for billions of dollars and two and half decades of continued efforts to build democracy and strengthen the country's rule of law. Short of new ideas, they embraced the latest fad in international democracy assistance: judicial reform. Drawing upon the





existing public distrust of the judiciary, foreign diplomats portrayed judges and prosecutors as villains who were causing all of Albania's ills. The solution was justice reform, which – as portrayed by Donald Lu, the former U.S. ambassador to Albania – was the only "opportunity of ridding the Albanian judiciary of corrupt judges and prosecutors who [stole] the money of ordinary citizens and [allowed] organized crime figures, murderers, and corrupt politicians to buy justice." The rationale for the reform was simple: Start by cleaning up the judiciary, and then the judiciary takes on corrupt politicians and organized crime, restoring the rule of law and well-being of people.

Since the fall of communism in 1990, two parties have dominated Albanian politics: the Socialist Party and the right-wing Democratic Party. They have taken turns holding power, each promising to strengthen the rule of law and fight corruption, but each has ended up consumed by corruption and scandals. The 2013 parliamentary elections ended eight years of rule by the Democratic Party and brought the Socialists, which campaigned on an anti-authoritarianism and anticorruption platform, back to power. The European Commission saw an opportunity to condition the country's negotiations to join the European Union with the approval of thorough judicial reform, using "institutional, legislative, and procedural measures."2 The new Socialist government seized the opportunity to lay claim to the reform and made it its highest priority. The Democrats, in opposition, were wary that the government could use the reform to seize control of the judiciary, so they initially resisted the effort, but under pressure from the EU and the United States, they reluctantly joined it.

In November 2014, an ad hoc parliamentary justice reform committee was established, assisted by a group of domestic and foreign experts. A reform strategy and a package of constitutional amendments were submitted to Parliament in July 2015. Then came a year of political handwringing and difficult negotiations, before Parliament unanimously approved 46 constitutional amendments, laying the infrastructure for a new justice system. A set of laws providing the legal framework for organizing and managing the new judiciary was enacted soon after, passed by the Socialist majority after the opposition boycotted the vote.

Justice reform had three goals: to guarantee the independence of the judiciary from political interference; to cleanse the system of corrupt and incompetent magistrates; and to strengthen the fight against corruption and organized crime. To achieve these goals, all existing judicial and prosecutorial institutions were reformed or abolished, and new institutions were established. The judiciary's governance was entrusted to three new independent bodies: the High Judicial Council and the High Council of

Prosecutors, which were responsible for standards and career management, and the Office of the High Inspector of Justice, which was responsible for disciplinary proceedings against judges and prosecutors at all levels. Two specialized independent institutions – the Special Prosecution Against Organized Crime and Corruption (SPAK) and the Special Courts Against Corruption and Organized Crime – would deal with high-level corruption and organized crime. A full-fledged vetting of all sitting judges and prosecutors at all levels was also instituted; this was conducted by two ad hoc bodies assisted by the International Observing Mission appointed by the European Commission.

#### **An Imposed Reform**

Albania's justice reform was assisted and financed by its foreign partners, primarily the EU and the United States, whose experts had a leading role in the reform's design and implementation.<sup>3</sup> The EU and the U.S. also pressured all parliamentary parties to approve the reform.

This was arguably the most radical reform in scope and extent that has been implemented in Albania since the end of communist, one-party rule. One-third of the Albanian Constitution was amended, more than 40 laws and legal amendments were enacted,<sup>4</sup> and hundreds of rules and regulations were adopted. Every institution at every level of the justice system was affected. Short of an entirely new Constitution, such a transformation of any country's Constitution and legislation was hardly precedented.<sup>5</sup> As praised by its prime movers, the EU and the U.S., the reform was indeed "revolutionary" and "historic and unprecedented [in] magnitude."<sup>6</sup>

This reform also featured probably the most sweeping judicial vetting ever implemented. Partial judicial vetting had been used before in other countries as a transitional justice mechanism.7 But Albania's vetting was full-fledged: All judges and all prosecutors at all levels, more than 800 people in total, were assessed on three fundamental aspects: wealth, competence, and integrity. The European Commission for Democracy through Law, a group of legal experts also known as the Venice Commission, considered the level of vetting a radical measure but relented that it might be appropriate and necessary, given the high level of corruption in the Albanian judiciary. However, the commission underscored the risk that vetting disrupts the course of justice and creates opportunities for the judiciary to be captured by the political force that controls the process.8 On paper, the Albanian reform also aimed to insulate the judiciary from other branches of government - it was intentionally designed to exclude any significant involvement by outside institutions in the judiciary's governance.





In fact, the reform's designers had set out to achieve two arguably conflicting goals: securing the judiciary's complete independence from political interference while at the same time avoiding an unaccountable judiciary. To this end, they divided governance responsibilities among several separate institutions within the system to avoid a concentration of power and introduced interdependence among these institutions in the form of checks and balances. For example, the nine members of the Constitutional Court are nominated by the Judicial Appointments Council. Three of them are confirmed by the High Court, three by Parliament, and three by the president. The members of the High Judicial Council, which appoints members of the High Court, are elected by all sitting judges and several external nonpolitical institutions.

Given this unique approach and its inventive elements, Albanian justice reform was by design a risky experiment. As described by Andrea Mazelliu, a lecturer in law at New York University in Tirana, it sent Albania into uncharted waters.<sup>9</sup> And it has been a troublesome voyage.

#### **Overhauling the System**

Justice reform started with the constitutionally mandated vetting process required of all new judicial appointments. Legal challenges and political infighting delayed this process, which then moved slowly,<sup>10</sup> mainly due to a lack of resources. About 60% of the personnel who underwent vetting were dismissed or resigned.

Due to the protracted vetting process, the three new judicial governance institutions were created almost three years past the constitutional deadline to do so.<sup>11</sup> Such delays, combined with the huge number of vetting dismissals, left vacancies throughout the judicial system. The nine-member Constitutional Court and 19-member High Court were left with one member each. The Constitutional Court remained paralyzed from May 2018 to December 2020, while the High Court's paralysis lasted from May 2019 through March 2020. And that court was left mostly nonfunctional for two more years after that. It was the first time in modern history that a nation had no functioning supreme courts.

The situation was grave throughout the judiciary as vacancies decapitated all the country's courts. "Moving from corrupt courts to no courts at all was not an adequate solution" for successful reform, noted Megi Bakiasi, an Albanian legal scholar. 12 Ylli Manjani, a former minister of justice, described the reform results with a medical witticism: "The operation was successful, but the patient died." 13

This unforeseen turn of events shifted the reform's focus to saving the judiciary from the collapse brought on by the reform itself. In this rescue mission, numerous constitutional and legal violations were committed; "temporary," legally dubious mechanisms were employed; and legal loopholes were utilized. <sup>14</sup> Foreign partners who were at least partially responsible for the reform's failings often proposed and defended these infringements. <sup>15</sup> Thus, reform to restore the rule of law turned into a series of violations of the rule of law.

The Albanian government and the international community framed this grave situation as just a few temporary setbacks and consistently sought to redirect public attention to the process rather than the outcomes. They lauded the enormous number of vetting dismissals and praised the formal establishment of the new judicial institutions, ignoring the reform's impact on people's lives.

### Assessing the Reform's Results

The economist Milton Friedman once called the judging of policies and programs by their intentions rather than their results the biggest mistake in policymaking. A policy may look reasonable on paper and still fail in practice, hurting instead of helping people. Now that justice reform is all but complete, it is time to look beyond its intentions to its results: What is people's access to justice in Albania now? What about the fight against corruption? Do people trust the new judiciary? What about the rule of law?

During 2023, of the 408 judges authorized in the judiciary, only 247 were effectively in office. In particular, the 102 seats available in the courts of appeals were filled by only 46 judges – a vacancy rate of 55%. 16 The statistics would have been worse, but in 2023 the government implemented judicial remapping – opposed by human rights nongovernmental organizations, trial lawyers' groups, and the political opposition - that reduced the number of courts in an effort to mitigate the problem of vacancies. The number of first-instance courts was reduced from 22 to 12, and of appeals courts from five to one.17 While this lowered the number of judgeships in the system, it simultaneously reduced access to judicial services and increased costs for those using the courts. It is also worth noting that 45% of all sitting judges have been appointed in the past four years. and almost all of them are first-time judges fresh from the Magistrates School and thus have limited professional skills.

The case backlog remains serious. At the beginning of 2024, Albania's High Court had a caseload of almost 26,000,<sup>18</sup> which at the current rate will take more than five years to clear. A current case reaching the High Court today is expected to take about five to eight years to be reviewed. The General Court of Appeals had a backlog of almost





38,000 cases, and the Administrative Court of Appeals had one of more than 23,000 cases – and both are increasing. These backlogs may need seven to 10 years to clear.

In the meantime, substantive progress in the fight against high-level corruption remains elusive. When SPAK was established five years ago, the moment was lauded as the beginning of the end of impunity. Its prosecutors and investigators were given special protection, resources, and assistance to prosecute corrupt politicians and organized crime. This mission has indeed been fulfilled in some cases: Dozens of high- and mid-level politicians, including several former ministers, have been investigated, and a few have been convicted. Even though most investigations started only after those officials had left office, their prosecutions boosted SPAK's credibility. But then SPAK failed at what matters most: facing real power and investigating those in the highest offices.

In recent years, Albania has been hit by several grand corruption scandals related to decisions made at the highest levels of both central and local governments. However, despite years of investigations, so far SPAK has not investigated the role of the prime minister and his top aides in their dealings, focusing instead on underlings. Critics allege that SPAK has stalled investigations because of political pressure. Whatever the truth, one thing seems clear: Public confidence in SPAK and its independence from the government have been shaken.

Indeed, eight years after the start of justice reform efforts, the public's perception of Albania's corruption problem has worsened. It ranked 98th out of 180 countries in Transparency International's 2023 Corruption Perceptions Index, significantly worse than in 2016, when it ranked 83rd out of 176 countries. Peccently, the U.S. Department of State called Albania a difficult place to do business, with investors citing public corruption and a weak judiciary as the main challenges. <sup>20</sup>

Public trust in the judiciary has sunk to almost pre-reform levels. According to the European Commission's Balkan Barometer, in 2023, 74% of Albanians distrusted the judiciary, a slight improvement from in 2016, when it was 81%.<sup>21</sup> Almost 58% of Albanians believe that the Special Courts Against Corruption and Organized Crime are influenced by politics, and 47% think the same of SPAK.<sup>22</sup>

# What Went So Wrong?

In hindsight, some of the problems arising from the judicial reform process could have been foreseen and failures could have been avoided with strategic and scenario planning. But the reform was conceived as a shopping list of measures

to be implemented à la carte, and thus committed a common mistake in policymaking: not recognizing the difference between policies conceived on paper and their implementation in practice, where unforeseen dynamics and unexpected consequences often arise. The rush to reform – an overreaching, complex, inventive reform designed in only seven months – did not help to avoid this pitfall.

But the fundamental flaw of the reform was that it was based on a narrow technocratic-legalistic vision of justice. To its architects, Albania's justice problems were technical and therefore could be solved with technical remedies. The renowned development economist William Easterly calls this a cooking recipe approach: If you get the ingredients right, you get the dish right. Similarly, this justice reform focused on system design – devising the right institutional framework and the right operational rules. Its prime movers, European and American diplomats and bureaucrats, believed they could shape Albania's judiciary by changing laws and organizational structures, despite the country's political culture and specifics.

Vincent van Gerven Oei, a Dutch scholar and astute observer of Albania's justice reform, noted that the reformers ignored the underlying fact that "the rule of law" is a *political* and not a *legal* concept,<sup>23</sup> which pertains to the way power is organized and exercised in society. Separation of powers and judicial independence are fundamentally political principles for organizing the government, and they cannot be achieved outside the structure of power.

Along these same lines, the Georgian law professor Vakhushti Menabde has emphasized that the "independence" of the judiciary from political and group influence and return [of justice] to the service of people cannot be achieved through technical discussions and technical reforms but through political reflection upon the question of power."24 Such a reflection did not happen when Albania's judicial reform was conceived, despite some recognition that there were problems in the justice system.<sup>25</sup> On the contrary, the reform's designers treated it as just another public institution rather than one of the three branches of power. Therefore, despite its constitutional revisions, the reform's focus remained on the framework of juridification - on detailing rules and legal regulations - without touching the structure of political power. This was also the reason the reform's design was entrusted to experts in the first place, ignoring the formal political process.

However, behind the technical facade, heavy politicking and efforts to influence the content of reform on behalf of group and individual interests ensued. First, both the political majority and the opposition tried to use the reform to gain influence over the judiciary – the Socialist majority





held all the levers of power, and there was a general perception that it achieved significant control over the new institutions of justice.<sup>26</sup>

For the European Commission, the reform was a prop for Albania's stalled EU integration process and a way to increase its influence over Albania's politics.<sup>27</sup> Likewise, the U.S. administration believed that having influence over the new judiciary would help it push efforts against organized crime, trafficking, and corruption in Albania, all of which were important for domestic and regional stability in the Balkans.<sup>28</sup>

At a lower level, personal ambitions and interests were also at play. Some of the domestic experts involved saw the reform as a stepping stone to careers in the judiciary – indeed, several later-occupied positions they had assisted in designing.<sup>29</sup> The EU and U.S. ambassadors to Albania, both serving their first ambassadorial appointments, aggressively rushed reform's design and approval,<sup>30</sup> wanting to see tangible results before their respective tours were over.<sup>31</sup>

Such legitimate interests would not have undermined the quality of the reform if it had been designed in a transparent and participatory manner. But the reform's design was a closed affair involving a small group of people, all of them part of Albania's legal and political elite. These high-level experts were in fact the "usual experts," the same people who had designed every past constitutional and legal reform in Albania. Ironically, many of them had been or were key figures in the ailing justice system they were tasked to reform and save. 32 Also, all members of the parliamentary committee responsible for drafting the reform had served in key positions in past governments that were accused of encroaching on the judiciary. Not least important, with few exceptions, all the experts and politicians who designed the reform had been educated under the communist legal education system. Essentially, the mission to create the new judicial system was entrusted to those who had created or governed the old one - the establishment was called to arms to "overthrow" itself.

An insightful sentence from Inva Nela, a policy analyst, perfectly summarizes the main causes of reforms failings: "The short time was allocated to complete deep changes, [ignoring] the socio-cultural context, the oversized role of current political elites in the design and implementation [of the reform], the overriding of good governance [considerations] by other strategic priorities, insufficient involvement of the citizens and an overestimation of the country's abilities to produce new qualified members of the judiciary willing to become part of the new institutions."33

In 2013, before the justice reform was conceived, Joaquin Urias, the outgoing head of the EU's Assistance Mission to the Albanian Justice System, observed that efforts to reform the Albanian judiciary always fail for the reason that "they are not taken because Albania wants them but because the European Union demands them." The Albanian authorities, which do not want to improve the judiciary, undertake only superficial efforts in order "to give candy to the European Union." Urias underlined that the European Commission, which "operates on political interests," hides its political stances by presenting them as technical views. "That is the reason the Commission tries to highlight progress even when there is none – it is politically interested in keeping Albania motivated and hopeful of its EU membership."

It seems that Urias foretold the destiny of the justice reform that was to come. For all that matters, it is time for the European Union and the United States to pass up "candy" and reach for the bitter pill of reality. They should admit justice reform's failures and should recommit their support to consolidating its achievements: The new judiciary governance institutions should commit to good governance practices; a cleaner judiciary, now made up of mostly young magistrates, should develop its professional capacities; and, most importantly, SPAK should take the leap to investigate the highest levels of government.

Albanians overwhelmingly supported justice reform because of their belief that the EU and the U.S. would guarantee the integrity and the independence of the new judiciary. This is, of course, a naive belief, but it shouldn't be all in vain.



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