

Council of Europe
Conseil de l'Europe



European Union
Union européenne

PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

TECHNICAL PAPER

**PRELIMINARY STUDY: CORRUPTION RISKS IN THE PROCESS OF
ADMINISTRATIVE COMPLAINTS AGAINST JUDGES IN ALBANIA**

Prepared by:

Ylli Manjani, Council of Europe expert
July 2010

Table of Contents

1 OVERVIEW.....	3
2 LEGAL FRAMEWORK.....	4
2.1 Submission of complaints	4
2.2 Procedures for verification of complaints.....	6
3 FREQUENTLY RAISED ISSUES/PROBLEMS.....	10
4 SUGGESTIONS.....	11
4.1 Clarify the legal competencies and terminology aiming to avoid possible duplications among two inspectorates.....	11
4.2 Strengthen the institutional capacities of the HCJ and its Inspectorate.....	11
5 RECOMMENDED SOURCES AND INTERVIEWEES	14
5.1 List of reports/studies/sources;.....	14
5.2 List of recommended persons to interview.	14

For any additional information please contact:

Corruption and Fraud Unit
Economic Crime Division
Directorate of Co-operation - DG-HL
Council of Europe
F-67075 Strasbourg Cedex FRANCE
Tel +33 388 41 29 76/Fax +33 390 21 56 50
Email: lado.lalicic@coe.int
Web: www.coe.int/economiccrime

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe

1 OVERVIEW

Albanian legislation approved after the ratification of the new Constitution in 1998 brought a new concept on the Judicial Power. One of the newly introduced concepts in this legislation was the citizens' right to complain against any judge behavior. Such complaints are called Administrative Complaints. Traditionally it has not been prohibited to complain against any judge but there were no legal provisions on how the complaints were addressed or handled.

In May 2001 the Albanian parliament approved the Law "On the Organization and Functioning of the High Council of Justice". This Law derived from a need for a regulation of the functioning of the High Council of Justice (HCJ), which was foreseen in article 147¹ of the newly approved Constitution. This Law, among other things, sets the concept of the extra judicial complaints against the judges and their behaviour.

Based on this Law, both the HCJ and the Minister of Justice (MoJ)² are entitled to verify any complaint against the behaviour of any judge of the district and Appeal Courts³. According to the official records of the HCJ, in 2007 were registered 750

¹ Article 147 of the Constitution states:

1. The High Council of Justice consists of the President of the Republic, the President of the High Court, the Minister of Justice, three members elected by the Assembly, and nine judges of all levels elected by the National Judicial Conference. Elected members stay in office for five years, without the right of immediate reelection.
2. The President of the Republic is the Chairman of the High Council of Justice.
3. The High Council of Justice, on the proposal of the President, elects a vice-chairman from its ranks. The vice-chairman organizes the activity of the High Council of Justice and chairs its meetings in the absence of the President of the Republic.
4. The High Council of Justice decides on the transfer of judges as well as their disciplinary responsibility pursuant to law.
5. Transfer of judges may not be done without their consent, except when the need for reorganization of the judicial system requires it.
6. A judge may be removed by the High Council of Justice for commission of a crime, mental or physical incapacity, acts and behaviour that seriously discredit judicial integrity and reputation, or professional insufficiency. The judge has the right to appeal this decision to the High Court, which decides in the joint colleges.

² Both the HCJ and the Minister of Justice have their own inspectorates, by which they may inspect courts and the judge's behaviours. Such duplication of the functions has provoked debates and discussions but still remains like this. However, the HCJ frame law solves the issue of the verification of complaints for both institutions.

³ Judicial power is exercised by the High Court, as well as by the six courts of appeal and about 30 courts of first

complaints, in 2008 were registered 2100 complaints and in 2009 only 1100 complaints against judges. Only 520 of them have been reviewed and verified and in very few cases were made recommendations for disciplinary measures. The findings of verification is registered in the files of the judges by the HCJ, to possibly be considered for her/his professional evaluation. So far there is no dismissal of any judge, due to the verification of any complaint.

2 LEGAL FRAMEWORK

The HCJ Judicial Inspectorate takes the authority to investigate complaints from the Law "On the Organisation of the Judicial Power in the Republic of Albania" and from article 16 of the Law "On the Organization and Functioning of the High Council of Justice".

Article 16 of the Law on the High Council of Justice is perhaps the most revealing piece of legislation regarding the extent and the modalities for the implementation of the investigative competencies against Courts and judges. This article of the Law clearly provides the duties of the Inspectorate⁴ of the HCJ and the basic procedures for such verifications. This article, read in the frame of the whole Albanian Legislation for the Administrative Complaints, answers two main questions: 1- how and where to submit a complaint? and 2- what is the procedures to verify it?

2.1 Submission of complaints

As briefly explained above, the whole concept of the administrative complaint to any judge of the Republic is relatively new. For the first time this concept was legally introduced in the year 2002 through the Law on the Organization and Functioning of the HCJ. The Law tends to explain the right of the citizens to raise a complaint against judges and some basic procedural principles on how the review of the complaints is preformed. There are also some detailed by-laws⁵ applicable which help the inspectorates (not the complainer) to perform their duties.

Under article 16 the Inspectorate of the High Council of Justice "...verifies or sends to the Minister of Justice for handling complaints of citizens and other subjects that are directed to the High Council of Justice about actions of judges considered to be in conflict with the proper fulfilment of duty. The Inspectorate verifies only those complaints that cannot be solved through a judicial appeal or for the exclusion of the members of the judicial body. It

Instance, which are established by law.

⁴ The Inspectorate of the HCJ is established under the HCJ and its basic duty is to perform the inspections on the judges and court performance. See article 16 of the Law for the HCJ.

⁵ The most serious effort to preparation the package of the by-laws for both inspectorates was done by the USAID through its contractor ISPL during the year 2006. There was a draft manual proposed to the Minister of Justice and the HCJ for approval, but so far only the HCJ has approves some parts of the manual.

verifies the complaints of citizens and other subjects that are directed to the Minister of Justice and that are judged by him to be followed up by the Inspectorate of the High Council of Justice..."

This article states the right to complain against any judge's performance, which has the right to complain, the scope of the complaint and the institutions in charge for reviewing these complaints.

- **The right to complain.** Based on Article 16 of the HCJ Law, **belongs to either citizens or to other subjects.** It is true that the definition is broad, but reading this article in the context of the Albanian legislation the right to complain against any judge belong to normal citizens and/or the private and/or public legal entities which are registered or founded under the civil legislation⁶. Although it is not clearly stated in this Law, the Code of Administrative Procedures⁷ provides that the complainant has to show that its interests are violated by the behaviour of the judge. On the other side the associations and other legal entities whose scope of work is protection of wide interests, are also entitled to submit complaints against any judge.
- **Who is subject to complaints.** The Inspectorate of the HCJ (or to the Minister of justice) will accept complaints **only against the District and Appeal Courts judges.** Judges of the High Court⁸ are not subject to the jurisdiction of neither inspectorates (the HCJ and the Ministry of Justice). The High Court judges can only be impeached by the Parliament in very specific circumstances, provided in the Albanian Constitution⁹.

⁶ Civil legislation in such context basically includes the Civil Code, the Law for the Commercial Companies and the law for the Non-Profitting and Non-governmental Organizations (NGO).

⁷ Article 45 of the Administrative Procedures Code States that:

"1. The holders of the rights and legal interests affected from the decisions taken by the administrative proceeding, have the right to start and participate in the administrative proceeding. Associations and organizations are entitled to the above rights.

2. In order to protect the wide interests affected by the administrative proceeding, these have the right to start such a proceeding and/or to participate in it:

a) the persons to whom the administrative proceeding causes or might cause damages in the common rights, i.e. public health, education, cultural inheritance, environment as well as quality of life.

b) the person who live in or close to a public property which might be damaged by the administrative proceeding.

3. The associations acting to protect the wide public interest are entitled to start or to participate in the administrative proceeding."

⁸ Article 136 of the Constitution states that judges of the High Court are appointed by the President of the Republic and with the consent of the Parliament.

⁹ According to article 140 of the Constitution a judge of the High Court may be impeached on the grounds of committing a crime, violation the Constitution and being physically and mentally incapable to perform its duty. On such grounds the judge of the High Court may be discharged by 2/3 of the members of the Parliament. The decision of the Parliament for the discharge the judge is reviewed by the Constitutional Court.

- **Admissible complaints.** The Law provides that only those complaints **that cannot be solved through a judicial appeal** will be accepted and handled by the inspectorates. Such limitation is fair and logical because the inspectorates should not be considered as Courts of Appeal. Furthermore, Article 24 of the **by-law on the Organization and Functioning of the Inspectorate of the HCJ**, provides a more detailed definition of the complaints that are verifiable by the inspectorate. This article states that the Inspectorate will consider for further verification only those complaints that claim for *“1.... facts and circumstances that may lead to the dysfunction of the Office of the Judge; facts and/or circumstances which may indicate that the judge has violated the solemnity in the trial, the rules for fast and fair trial, ethical rules in communication, misbehavior in or outside the court premises, and other claims that may lead to any violation of the legislation...”*. Article 24 also states that, *“ 2....Claims for the issues that are directly related to the appellate procedures and for the expelling of any judge by the specific trial, are not subject of verification by the inspectorate...”* .
- **Where should complaints be submitted?** This question is not very clearly answered in the Law because of the existence of the parallel inspectorates. Even though the competence of the Verification of Complaint is clearly given to the HCJ (article 16 of the HCJ Law), practically the **complaint may be submitted in either inspectorate (the Inspectorate of the High Council of Justice or the Inspectorate of the Ministry of Justice)**. This may lead to possible confusion or to the duplication of procedures (complaints presented to both Inspectorates were handled differently and different conclusions were drawn). Article 27/2 of the Rules of the HCI Inspectorate, reflects this dualism while further explain how to avoid possible duplications. This article states that,... *“in cases where the complaint is filed in both Inspectorates, the verification will be performed by the MoJ..”*. From the legal point of view it is a paradox, because the Law for the Organizational and Functioning of the MoJ does not clearly give such competence to the Minister. As mentioned above the Verification of Complaint is clearly given to the HCJ, by the HCJ law.

The answer to the questions of how and where to file a complaint could be summarized as follows:

Any citizen or legal entity whose interests are violated by the behaviour of a judge of a district or appeal court, is entitled to submit its complaint to the Inspectorate of the HCJ or to the Inspectorate of the Minister of Justice. In order to be accepted, the complaint must be raised only for the issues that are not within the jurisdictions of the court system” .

In addition to where the complaint is filed, the procedures for the verification of the complaint remain very important.

2.2 Procedures for verification of complaints

The law sets the minimum basic principles for the procedures of the review of the complaints. As mentioned above, there are no detailed procedures on how this process is handled. However the practice has already set its precedents.

Based on what the law provides for the review of the complaints, we may distinct two categories of the complaints: 1- complaints that may result to a disciplinary measure of the judge and, 2- complaints that may not lead to the disciplinary proceeding.

Article 16 of the Law on the Organization and Functioning of the HCJ, provides as follows:

b) *The verification is performed only after the judge has first been notified. The Inspectorate verifies whether the complaints contain facts and circumstances that might constitute a legal cause for a disciplinary proceeding or for a moral and professional evaluation of the judges.*

c) *If legal reasons for a disciplinary proceeding are observed, the explanatory supporting statement and the respective documentation are sent immediately to the Minister of Justice, through the Vice Chairman of the High Council of Justice, for judgment about a disciplinary proceeding."*

Some procedural detail is added to the aforementioned competence of the inspectorate to verify complaints through the by-law "On the Organization and Functioning of the Inspectorate of the High Council of Justice" (articles 23 up to 35). The concrete procedures for the verification of any complaint by the inspectorate of the HCJ are as follows:

- A **Register of Complaints** is set up under the said regulation. The register is **administered by the Chief Inspector**.
- For each and every inspection, the Chief Inspector issues an **order**. The order determines the individual inspector(s) charged to perform the investigation, the **scope of the investigation**, the individual judge that will be investigated and the timelines within which the investigation is to take place.
- The Chief Judge of the court where the investigated judge serves as well as the judge him/herself is **notified beforehand**.
- The findings of the investigation are **consequently presented** in a report.
- The report with the findings of the inspector along with the claims of the investigated judge is then **submitted to the Chief Inspector**.
- When the findings of the report **indicate cause for disciplinary** proceeding against the judge, the Chief Inspector prepares an explanatory note, which is then sent to the Minister of Justice through the Deputy Chairman of the High Council of Justice. It is not very clear from the language of the by-law who is called upon to make a judgment whether the case should be referred to the Minister of Justice¹⁰. However, in practice, it seems that the report compiled by the

¹⁰ Article 31, point 9 of the Law for the Organizational and Functioning of the Ministry of Justice states that; ".9. It (The minister) carries out inspections and holds disciplinary proceedings of judges and courts of the first level and of appeal..."

investigative inspector already contains a **proposal** whether the presumed misbehavior constitutes disciplinary actions or not.

- Consequently, the inspector's proposal is reviewed by the Chief Inspector of HCJ who makes a final decision whether to refer the case to the Minister of Justice. Again, it is not very clear whether the Deputy Chairman of the HCJ can refuse to refer the case to the Minister despite the proposal to do so by the Chief Inspector. Clearly, this issue **is settled consensually** between the Chief Inspector and the Deputy Chairman. It is the interpretation of this consultancy that in case of collision between the Chief Inspector and the Deputy Chairman the opinion of the latter should prevail.

The procedural key steps set in the Law on the Functioning of the HCJ and to the Rules for the Organization and Functioning the Inspectorate of the HCJ, which must be followed, are:

- Submission of the complaint;
- Registration of the complaint in special Register of the HCJ;
- Pre-assessment of the complaint;
- Check with the other inspectorate to avoiding any possible duplications;
- Decision making for further verification procedures;
- Notification of the Judge subject to complaint and the Chief of the Court;
- Start the process of the verification of the complaint;
- Perform verification process within deadlines set by the regulation
- Prepare and submit the report on the findings;
- Archive of the file or decide to start the disciplinary procedures.

Below is the chart of chronologic procedural steps as foreseen in the Rules of the Inspectorate of the HCJ, for the submission, registration and verification of the complaints:



3 FREQUENTLY RAISED ISSUES/PROBLEMS

The wording of article 16 of Law for the HCJ, the respective by-law mentioned above and its implementation in the situation where there are two inspectorates under two different institutions in charge of verifying the complaints, has raised the following questions:

- Is the by-law On the Functioning of the Inspectorate of HCJ a good and exhaustive procedural document that guarantees a fair process of verification of the complaints against any judge?
- In cases when the inspectorate of the Minister of Justice performs the verification of the complaint, are they obliged to inform the HCJ and/or its Inspectorate?
- What is the methodology used by the inspectors to verify complaints? Can they review the files of the court? Can they perform interviews? Is interviewing mandatory for the person asked to be interviewed?
- Can the High Council of Justice impose disciplinary sanctions on judges merely based on the findings of the Inspectorate (following its investigation of the complaints) without referring the case to the Minister of Justice?
- What would happen if in the course of the investigation of a complaint the Inspectorate of the High Council of Justice finds out that a judge has violated his/her legal obligations and asks the Minister of Justice to bring a disciplinary action but the latter fails to do so? Can the High Council of Justice start disciplinary proceedings itself in such a case?
- Can the Inspectorate and the High Council of Justice scrutinize the content of a court decision with a view to identify violations on the part of the judges?
- Is the time allowed for verification appropriate (30 days from the registration in the Register of Complaints) when no time-limit is given to the Chief of Inspectorate to make the preliminary assessment and a decision on a further verification?
- Given that so far no corruption cases were brought to light after verification procedures handled by the two Inspectorates, are the Regulation transparent and in service of the citizens' rights?

The question whether the above-mentioned procedures provide a watertight legal document on the fight against corruption in the court system remains an issue that needs to be further explored. The questions raised above are indeed potential legal loop-wholes that weaken the anticorruption initiatives.

Statistically, the number of Judges disciplinary proceeded by the HCJ for Corruption remains low (indeed it is almost zero). The figures indicate either the incapability of the inspectorates to fight corruption or the high level of sophistication of the corruption phenomena in the court system.

4 SUGGESTIONS

Looking through the procedures and legal development regarding the verification of complaints in light of anti corruption, the consultant makes the following suggestions/recommendations

4.1 Clarify the legal competencies and terminology aiming to avoid possible duplications among two inspectorates.

- **Improvement of legislation.** In order to clarify the dilemma “Where to file the complaint, in the HCJ or to the MoJ” , legislative changes are needed. This will ideally requires the amending the HCJ Law and the MoJ Law. The Constitutional Court on its decision nr 11 dated on 27.05.2004, emerge for the need to further clarify the competencies, responsibilities and the respective terminology regarding the Verification of Complaints, Judicial Inspections (with intention of avoiding duplication) in the respective laws. Such amendments will aim improving the legal framework, which will lead to a better and efficient way to either verify the complaints or to the Judicial Inspection at all.
- **Issuing a comprehensive manual for the verification of complaints.** A practical manual on how the inspection is being made my assist any inspector of any inspectorate to perform better. The manual will provide an unified and detailed methodology of performing the verification.

4.2 Strengthen the institutional capacities of the HCJ and its Inspectorate.

Aware of the fact that amending the respective legislation as above proposed is politically difficult it is suggested to implement the following additional measures:

- **Tasks of the Inspectorate.**

The Regulation on the Organization and Functioning of the Inspectorate of the HCJ is relatively comprehensive about description of actions/tasks under the verification of complaints process. Tasks are clear and outputs relatively well described. However, there remain two last tasks, according to the logic of the process, but missing in the Regulation: a) *responding to complainants on the result of verifications made* and b) *formally advising those inspected judges who are not deemed worth to be proceeded for disciplinary purposes.*

As a matter of fact there is no provision in the HCJ Regulation on the Inspectorate, nor is there any mention in the law on HCJ, upon the duty of the Inspectorate to

formally respond to the subject having made the complaint regarding the result of verifications made by the Inspectorate.

As far as inspected judges are concerned, the Inspectorate may in some cases terminate the verification process, without resorting the Minister of Justice for disciplinary proceeding. At the same time these are cases where complaints are not completely groundless. Much as other judicial inspectorate offices in the West, the JIO ends up those “middle” cases (i.e. small delays not seriously damaging the fate of the case at hand, etc.) by giving advice to inspected judges so that the small violations they have made do not repeat in the future, otherwise disciplinary proceedings would take place. The only difference with the western homologues is that such advising does not take place formally. The Inspectorate might consider the possibility to extend formal advisory letters to judges found in small violations situation, by having such act recorded in a revised and computerized Registry of Complaints (see further below for more). Such records might be of use for the Inspectorate some day when the evaluation of judges is due. Certainly, to add such a task a legal move is needed, in the form of an addition to the HCJ Regulation on the Inspectorate.

Recommendation: *It is suggested that both issues need to be properly addressed in the Rules of the Inspectorate of the HCJ.*

- **Structure and personnel**

The Inspectorate is a very simple office, in organizational terms, made up of just 12 inspectors and a chief inspector. A quick calculation of workload per inspector and the time needed for actions involved would reveal the insufficiency of staff numbers. So, a review of average number of verified cases in the last three years shows that the average inspection workload per inspector turns 7 cases per month or one case in every two working days.

Recommendation: *The Inspectorate should maintain the current staffing levels for purposes of verification of complaints at least in the short to medium term. An increase in staffing level might be considered in the long run if the nature and number of complaints rise.*

- **Assessment of working procedures in place.**

A profound look at the Regulation of HCJ on the Organization and Functioning of the Inspectorate reveals two obvious aspects: it provides overall the necessary frame for the Inspectorate to function, but it is rather thin on explaining working procedures. There is, however, a need that such regulation to further improve in the following aspects:

- The initial complainant-Inspectorate interface

So far, the Inspectorate has received citizens or other subjects' complaints by normal mail and has returned responses to them in the same way. There is a need, then, for *some formality to be introduced to the benefit of increased accountability* of Inspectorate as well as for filing purposes. A standard form might be suggested here to be filled out by both the complainant and Inspectorate official, specifying the number of protocol, the legal basis, the complainant coordinates, the object of complaint, the date of receipt, the deadline for response by the Inspectorate and the relevant signatures.

Crucial to such solution is the question of access of citizens, especially in remote district areas of the country, to the availability of such uniform standard complaint forms. *This might be an area of cooperation with the MoJ, whereby officials under its authority in the various administrations of Albanian courts might be charged with making available to all requiring citizens/subjects blank copies of such forms, which the JIO provides insufficient quantities every starting year*

Running such a new practice for JIO-citizen exchanges has its risks for a time, therefore, if the Inspectorate considers seriously its adoption, it should allow both the old and the new way to run in parallel until in its judgment all citizens are familiar to the new approach.

- Registry of Complaints.

The HCJ Regulation on the Inspectorate provides for registration of all incoming complaints in a Registry of Complaints, following the issuance of an internal regulation by the deputy chairman of the HCJ. As of today, such internal regulation has not been issued yet, and consequently, no Registry of Complaints exists. If recommendations made under point 1) are applied, it will be easy to transfer the proper information from the filled out forms into the Registry, since the necessary data to be recorded in terms of coordinates and issues involved would have been gathered previously during the initial exchange between the complainant and the Inspectorate.

A major suggestion to be made here regards the introduction and use of IT. Of course the Registry might be a hard copy book with proper uniform indications to be filled for every incoming complaint. *A better way to deal with it is to set up a simple relational database, software, which permits easy entry and retrieval of complaints information and allows for the analysis and preparation of reports periodically at a very short time.*

- **Institutional arrangements with the Ministry of Justice**

The MoJ is practically conducting its own inspections upon receipt of complaints either by citizens or legal entities thereby sharing the same task with the Inspectorate. Although in reality the Inspectorate and MoJ have collaborated, sometimes by putting up joint teams, it might be possible to extend such spirit into a formal arrangement on terms of cooperation such as sharing information or inspection workload.

Recommendation: *Such duplication can be terminated if the Minister of Justice stops such practice and directs all complaints to the Inspectorate for further verification.*

5 RECOMMENDED SOURCES AND INTERVIEWEES

5.1 List of reports/studies/sources;

Related laws and by-laws, as mentioned through the text.

Annual reports of the High Council of Justice of 2007, 2008 and 2009, regarding the activities of the HJC and its inspectorate. (in Albanian)

Annual progress reports of the EU on Albania, for the years 2007, 2008 and 2009, (in English)

5.2 List of recommended persons to interview.

Bujar Nishani , Minister of Justice

Kreshnik Spahiu, Deputy Chief of the High Council of Justice

Valbona Vata, Chief of the High Council of Justice Judicial Inspectorate

Petrit Kaja, Director of Judicial Inspections, Ministry of Justice

Ervin Metalla and Manjola Bejleri, Associations of Judges

Artan Zeneli, Chairman of the Tirana District Court

Maksim Haxhia and Virgjl Kuraj, Albanian Bar Association

Fatmir Braka, Tirana Bar Association

Ardian Dhima, Executive Director, Institute for Policy and Legal Studies

Kathleen Imholz, former Legal Adviser to EURALIUS Project

Frank Dalton, Legal Office of the OSCE Presence in Albania