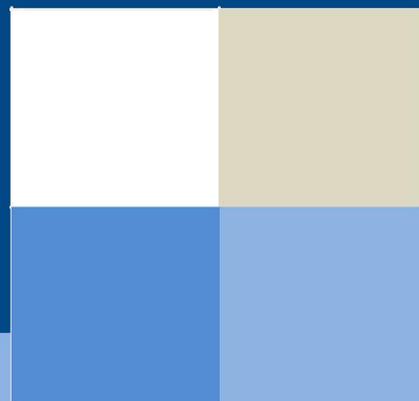


Policy Analysis - No. 01/2017



GROUP FOR LEGAL  
AND POLITICAL  
STUDIES

# An Analysis of the Vetting Process in Albania



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## Policy Analysis No. 01/2017

### An Analysis of the Vetting Process in Albania

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# AN ANALYSIS OF THE VETTING PROCESS IN ALBANIA

## I. Background Information

In June 2014, with the acquisition of EU candidacy status by Albania, the European Union presented a number of conditions that Albania must meet in order to begin accession talks. In the last three years, the Albanian government has been able to achieve moderate success on key priorities highlighted by EU institutions, with the judicial reform still representing the main stumbling block for the country.<sup>1</sup> Following the collapse of communism, no lustration nor vetting has been conducted to people who have served as judges and prosecutors during the communist era. For this reason, the European Union has urged Albania to reform its judiciary system with the aim to restore the trust of citizens in its courts.<sup>2</sup> EU Commissioner for Enlargement, Johannes Hahn, has repeatedly pointed out that Albania needs to deliver high quality reforms in order to begin accession talks with the EU.<sup>3</sup> High levels of corruption, lack of integrity and accountability within the judiciary have all been Albania's biggest challenges to overcome.

The re-evaluation of judges and prosecutors, known as vetting process, is a key pre-condition that Albania needs to fulfill.<sup>4</sup> Following pressure by key international actors such as the U.S.A. and the EU, as well as additional concrete threats to withdraw Albania's candidate status by the chairman of the German Parliament's EU Affairs Committee, the opposition, The Democratic Party of Albania (*Partia Demokratike e Shqipërisë*), and the government lead by the Socialist Party of Albania (*Partia Socialiste e Shqipërisë*) have reached a mutual agreement on the approval of a package of judicial reforms.<sup>5</sup> The Parliament of Albania has thus unanimously adopted these constitutional amendments in regard to the judicial reform, including the implementation of the Vetting Law. The two key pillars of the judicial reform package include the amendment of 46 articles of the Albanian Constitution and the approval of a bundle of laws (including the vetting law) set to create new judicial institutions. This law has vital importance for the political future of Albania, determining how quickly and expedite will be its accession path to the EU and how much credibility will be gained vis-à-vis the Albanian people over the judiciary system. In spite of everything, the proposal of the vetting law has sparked a heated debate and several controversies in the political arena of Albania. While the government argues that the vetting process will pave the way for Albania's European Union accession talks, key figures from the opposition have warned that public officials could use the new rules to influence judicial appointments, hence hindering the credibility of an already fragile system.<sup>6</sup> Given that the resignations of judges and prosecutors have been reported,<sup>7</sup> it is a crystal clear indication that the vetting process has started to plant its seeds.

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<sup>1</sup> European Commission (2016), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions", available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf)

<sup>2</sup> Andi Dobrushki (2016), "How Albania is reforming its trouble justice system", Open Society Foundation, available at: <https://www.opensocietyfoundations.org/voices/how-albania-reforming-its-troubled-justice-system>

<sup>3</sup> Foreign & Commonwealth Office, Nicholas Cannon OBE (2015), The judicial reform in Albania, GOV.UK, available at: <https://www.gov.uk/government/speeches/the-judicial-reform-in-albania>

<sup>4</sup> Id. at 1

<sup>5</sup> European Commission(2016), "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions", available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf)

<sup>6</sup> Beata Stur (2017), "Albania's vetting saga continues", NewEurope, available at: <https://www.neweurope.eu/article/albanias-vetting-saga-continues>

## II. Introduction

Vetting has often been a viable institutional mechanism for transitional democracies to assess judges and prosecutors' suitability for public employment.<sup>8</sup> One of the major objective of this reformative measure is to strengthen integrity and accountability in the public sector and restore confidence in national institutions and government.<sup>9</sup> The overall process touches especially areas of the public sector which tend to be more vulnerable to violation of human rights, such as police, prison services, the army and, of course, the judiciary.<sup>10</sup> The new Albanian vetting law will conduct thorough investigation and evaluation of skills, competencies, personality, assets and other aspects of a given individual of the judiciary system. Personnel which has been implicated in activities that cast doubts on their integrity and professionalism, incur into sanctions, which include removal from office, prevention from taking similar work positions, pressure to voluntarily resign from the position and/or face the public disclosure of their past. On few instances, vetting can comprise an entire institution or some institutions where violation of human rights has occurred. Moreover, the introduction of vetting procedures includes the establishment of screening practices that will operate as a preventive mechanism for future recruitment of people involved in the above-mentioned violations.<sup>11</sup> All of these provisions are necessary and inescapable measures to drive the Albanian judiciary closer to European standards. By introducing a well-architected vetting law, Albania aspires to build democratic and accountable institutions of high integrity that would prevent future repetition of human rights abuse.

The peculiarity of different national heritages and context, based on history, politics and socio-economic factors of Western Balkans countries, provide distinctive backgrounds requiring different vetting approaches.<sup>12</sup> Vetting processes have usually taken place in post-conflict and/or post authoritarian societies, namely transitional democracies where a violation of human rights has previously occurred.<sup>13</sup> Countries such as Hungary, Bosnia and Herzegovina, Kosovo and the Czech Republic have all undertaken vetting as a mechanism for institutional reform mostly as a post-conflict measure. Likewise, Albania, although not a post-conflict country, is still suffering from an undermined and weak judicial system following Enver Hoxha's dictatorship. Impunity, corruption, bias and lack of professionalism have gripped the judiciary of Albania, making the vetting measure a needed reform to restore integrity, impartiality and efficiency of the judiciary.

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<sup>7</sup> Interview with a public official; also available in the media

<http://www.ocnal.com/2016/09/justice-reform-in-albania-100-judges.html>,

<http://www.balkaninsight.com/en/article/vetting-law-expected-to-bring-resignations-in-albania-justice-institutions-12-23-2016>

<sup>8</sup> Pablo de Grieff and Alexander Mayer-Reiff (2007), "Justice as Prevention: Vetting Public Employees in Transitional, Advancing Transitional Justice Series Societies" p. 17, available at: <https://www.ictj.org/publication/justice-prevention-vetting-public-employees-transitional-societies>

<sup>9</sup> The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General. UN Security Council S/2004/616, 23 August 2004, p. 2, , available at: <http://www.un.org/en/sc/documents/sgreports/2004.shtml>

<sup>10</sup> The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General. UN Security Council S/2004/616, 23 August 2004, p. 2, <http://www.un.org/en/sc/documents/sgreports/2004.shtml>

<sup>11</sup> United States Department of State Transitional Justice Initiative: Lustration and Vetting (2016), p. 1, , available at: <https://www.state.gov/documents/organization/257775.pdf>

<sup>12</sup> Maja Kovac (2007), Vetting as an Element of Institutional Reform and Transitional Justice, p 3, , available at: [http://www.academia.edu/2565556/Vetting\\_as\\_an\\_Element\\_of\\_Institutional\\_Reform\\_and\\_Transitional\\_Justice](http://www.academia.edu/2565556/Vetting_as_an_Element_of_Institutional_Reform_and_Transitional_Justice)

<sup>13</sup> Id. p. 13

This paper aims to analyze the vetting process of Albania as an institutional measure, reflecting upon the benefits and flaws of the vetting process. The first section will consider the structure and methodology behind the vetting process and take a deeper look at the vetting law of Albania. The following chapters will analyze the opinion of the Venice Commission in regard to the law and take a closer look at the controversies that have been going on for months in the political arena of Albania. In addition to this, this policy paper will provide a comparative analysis between Albania's vetting process and the one applied in neighboring countries. Lastly, the final paragraphs of this paper will provide an in-depth conclusive analysis on the benefits and flaws of the new Albanian vetting process.

### III. Albania's Judicial Reform: The Vetting Law

According to several statements from EU institutions, the judicial reform is the only condition left to be fulfilled by the Government of Albania prior to accession talks.<sup>14</sup> Unlike other Western Balkan countries where vetting was undertaken as a post-conflict institutional measure, Albania presents itself as an atypical case. Vetting has emerged from the need to eradicate corruption and restore the faith of Albanian people in the judicial system. A similar story of vetting was seen in Kenya, where this reformative measure was taken to lustrate the judiciary from corruption practices and it was assessed as a successful measure.<sup>15</sup> On July 22, 2016, the Parliament of Albania approved all 17 constitutional amendments required to reform the justice system, aspiring to change its image by making it more independent, accountable and efficient. These constitutional amendments, *inter alia* represent the implementation of the Vetting Law, known as the temporary re-evaluation of the judges and prosecutors of the Republic of Albania.<sup>16</sup>

To carry out the vetting process, the vetting law foresees the establishment of two special institutions: a first instance Commission ("**First Instance Commission**") and an appeal chamber ("**Appeal Chamber**"), meaning that this process will not go through the existing ordinary court system, since judges are the subject of the assessment.<sup>17</sup> These institutions will be monitored by an International Monitoring Operation, composed by judges and prosecutors selected by different EU member states.<sup>18</sup> According to this procedure, international observers do not hold a decision-making role in the vetting process, holding more of a monitoring and supporting role in the overall process.<sup>19</sup>

Albanian judges, including judges of the Constitutional Court and of the High Court, Albanian prosecutors, including the General Prosecutor the Chief Inspector and all inspectors of the High Council of Judges, legal advisers of the Constitutional Court and of the High Court, legal advisers of the administrative courts and of the Prosecution General Office and former judges will all undergo vetting procedures if requested.<sup>20</sup> The Independent Qualification Commission

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<sup>14</sup>Albanian Daily News (2016), "Integration, Rama: Vetting Law the Only Condition", available at: <http://www.albaniannews.com/index.php?idm=10289&mod=2>

<sup>15</sup> UNDP Kenya, Amani Papers (2010), "Judicial Integrity and the Vetting Process in Kenya", Volume No 6, available at: [http://www.ke.undp.org/content/dam/kenya/docs/Amani%20Papers/AP\\_Volume1\\_n6\\_Sept2010.pdf](http://www.ke.undp.org/content/dam/kenya/docs/Amani%20Papers/AP_Volume1_n6_Sept2010.pdf)

<sup>16</sup> Lex Feranda (2016), "Çfarë është procesi i Vettingut, si funksionin dhe pse duhet në Shqipëri?", Online Newspaper 360grade, available at: <http://www.360grade.al/politike/item/39417-çfare-eshte-procesi-i-vettingut-si-funksionin-dhe-pse-duhet-ne-shqiperi>

<sup>17</sup> Law on the Transitional Re-evaluation of Judges and Prosecutors (2016), article 4.

<sup>18</sup> *Id.* article 7

<sup>19</sup> Romeo Merruko (2017), "Albania: Role of International Actors in the "Vetting" Process", Mondaq, available at: <http://www.mondaq.com/x/550690/Constitutional+Administrative+Law/Role+Of+International+Actors+In+The+Vetting+Process>

<sup>20</sup> Law on the transitional Re-Evaluation of Judges and Prosecutors, Albania, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)062-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e)

and the Appeal Chamber, as provided by Art.179/b, paragraph 5 of the Constitution, are the institutions which will decide on the final evaluation of the assessee. The decision shall be based on one or several components or based on an overall evaluation of all of three key components.<sup>21</sup>

In order to make vetting a just and fair process, the law provides a number of requirements for people in order to qualify as members of the re-evaluation of institutions. To be eligible, the selected individual should have not been a member, collaborator nor favored by the State Security services before 1990. As stated by Law No. 45/2015 'On the right of information to the documents of the former security service of the People's Socialist Republic of Albania', the Vetting Law, provides that the re-evaluation process shall be carried out in three components: (a) asset assessment, (b) background assessment, and (c) proficiency assessment".<sup>22</sup> This section will address the three key elements of the re-evaluation process.

### Asset Assessment

Asset assessment is the first component of the vetting law and the one that has created the most resistance by judges and prosecutors, skyrocketing, as a result, the number of resignations from office so as to not undergo vetting procedures. The centerpiece of the Asset Assessment component is the conduction of an overall audit of assets, following a declaration, assessing the legitimacy of the source of their creation. The assessment will make sure to evaluate any financial obligation behind the assets and any possible private interest rising from it, for the assessee and persons related to him or her.<sup>23</sup> All judges and prosecutors are abide to declare their assets allowing institutions to perform an asset investigation on her/his assets. Anyone under assessment must be able to justify his/her assets based on legitimate sources (i.e. income and tax declarations). The assessee in addition to the declaration of assets shall submit all the necessary documents necessary to justify the veracity and legitimacy of his or her statements. If the declared wealth happens to be twice as big as his/her legitimate income, the assessee is considered guilty and is dismissed from the office if not able to prove the contrary.<sup>24</sup>

### Background Assessment

The background assessment consists in the verification of the assesses' declarations and other data aiming to identifying links with individuals involved in organized crime. If the assessee, upon verification, is found guilty of having clear links with figures from the organized crime, he/she is dismissed from office if he/she is not able to prove the contrary<sup>25</sup>

### Proficiency Assessment

The proficiency Assessment makes sure that each subject will undergo evaluation skills. In the case of judges, they will be evaluated over their judging skills, while in the case of prosecutors; they will be evaluated upon their ability to conduct investigation. The proficiency assessment will also make sure to evaluate organizational skills, ethics and personal qualities of all the assesses, based on standards foreseen by the law. Individuals with subjects rated as "in

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<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Council of Europe (2016), "Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors (THE VETTING LAW) ", Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>24</sup> Id.

<sup>25</sup> Id.

shortcoming” are recommended to attend a training program at the School of Magistrates, while those assessed evaluated as inadequate for a certain skill, are dismissed from duty.<sup>26</sup>

However, the role of the Classified Information Security Directorate (“National Security Authority”), responsible for performing background assessment of judges and prosecutors,<sup>27</sup> has been at the center of controversies, sparking rough reactions from the Democratic Party, leading opposition party in the country. Considering that the Agency itself operates under government’s control, it has generated suspicions that the vetting process is to some extent controlled by the executive branch, being telecommunications and financial statements of its members periodically controlled by government agencies. Nevertheless, the Venice Commission has rejected this argument on the basis that the final verdict is always pronounced by the Independent Commission.

Furthermore the law on Temporary Re-evaluation of Judges and Prosecutors foresees that the assessee has the right to resignation not later than three months from the entry into force of this law.<sup>28</sup> This article of the law may be viewed that it provides a “free pass” for judges and prosecutors to not undergo through the vetting process. So far, there has been a handful number of judges and prosecutors in Albania who have resigned from office. They have given excuses such as shifts in ‘career focus’ and/or worrisome ‘health issues’.<sup>29</sup> The resignation are expected to increase in the very near future. However this “free pass” doesn’t constitute that judges and prosecutors cannot be subject of prosecution for possible criminal acts such as corruption and misuse of public office, nor does it give immunity to judges and prosecutors to not be charged with criminal acts of corruption and misuse of public office. This process in a way can be viewed as a filtering measure that gives the opportunity to corrupted judges and prosecutors to abandon the justice system.

The next chapter of this policy paper will undertake a thorough analysis of the *amicus curiae* provided by the Venice Commission.

#### IV. The four questions presented before the Venice Commission

As the vetting law was approved by the Albanian Parliament with 88 votes, tension levels vertiginously rose in the Albanian political arena and inside the opposition, which strongly objected the constitutionality of the law. Opposition forces thus filed a complaint to the Constitutional Court of Albania challenging the constitutionality of the law and its compliance with the European Convention of Human Rights. The opposition requested the suspension of the implementation of the vetting law until the Constitutional Court rendered its final decision. According to the Democratic Party, the vetting law violates the principle of separation of powers, since it allows the intervention of institutions that operate under the government in the process of re-evaluation of judges and prosecutors, arguing that it must be conducted solely by independent institutions created for this purpose. The Democratic Party of Albania demanded the Constitutional Court to request an opinion from the Venice Commission regarding the objections raised. British and American Ambassadors have strongly requested the adoption of this law at all costs even without opposition’s votes. However, on 30 August 2016, the Constitutional Court of Albania ruled to suspend the Law on Transitional Reevaluation of Judges and Prosecutors and requested an *amicus curiae* from the Venice Commission to

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<sup>26</sup> Id.

<sup>27</sup> Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors (THE VETTING LAW) ”, Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>28</sup> Law on Temporary Re-evaluation of Judges and Prosecutors (2016), Article 56.

<sup>29</sup> Interview with a public official

assess the conformity of Law No. 24/2016 on the Transitional Re-Evaluation of Judges and Prosecutors in the Republic of Albania with international standards including the European Convention on Human Rights.<sup>30</sup>

The first question presented before the Venice Commission asked for an evaluation on whether the participation of judges in the vetting process is to be considered as a conflict of interest, given the fact that the judges of the Constitutional Court are subject to the vetting law themselves. At the same time, the vetting law, as pointed out by the Venice Commission, does not provide for any particular rule of a possible conflict of interest requiring a removal of judges.<sup>31</sup> Hence, according to the Venice Commission, the Constitutional Court of Albania faced two choices, either preclude the possibility of a judicial review over the vetting legislation – due to the fact that regulations of conflict of interests are missing in the Law itself – or it had to acknowledge the relevance of the guarantees safeguarded by an operating judicial review of the legislation and to, therefore, face all the cases presented to its judgment.<sup>32</sup> If the Constitutional Court is asked to evaluate on a subject matter in which its members may have a direct interest, the Court is still not dismissed by the presence of an alleged interest from its duty to rule over the raised issue.<sup>33</sup> Nevertheless, if the Court had to rule on a matter that would cause ‘disqualifications arising from the possibility of any one or more of its members being the subject of an adverse finding under the legislation’, the Court would be exempted to make such a ruling.<sup>34</sup>

The ‘Bangalore Principles of Judicial Conduct 2002’ provides guidance on how to address such a situation, stating that in principle a judge not perceived impartial should not be allowed to participate in the hearing case. However, disqualification of a judge should not be necessary if no other tribunal could be established to assess the case.<sup>35</sup> This is always the case if there is merely one Constitutional Court present and if a disqualification of judge culminates in a lack of justice. If a judge fails to meet the requirements set by the vetting law, hence being technically unfit for office, not only he/she has the right to resign from its position, but, in some instances, might be forced to do so<sup>36</sup>. Yet, since the starting point presumes that all the judges of the court act and operate in good faith, the given judge shall be allowed to provide an evaluation over the constitutionality of the vetting law.<sup>37</sup>

As asserted by the Venice Commission, the lack of legislative elements of the vetting law covering conflict of interest, which could potentially result in the suspension of all Albanian Constitutional judges, might be interpreted as an acknowledgement of the Constitutional requirement to keep the functionality of judicial review as an asset. As the Venice Commission stated in the ‘Opinion CDL-AD(2009)044 on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania’:

*it must be ensured that the Constitutional Court as guarantor of the Constitution can function*

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<sup>30</sup> Online article Panorama (2016), Zbardhet vendimi/ Kushtetuesja i reziston edhe SHBA-së, pezullon ligjin e “Vettingut”<http://www.panorama.com.al/kushtetuesja-i-reziston-edhe-shba-se-pezullon-ligjin-e-vettingut/>

<sup>31</sup> Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ”, Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ”, Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>36</sup> Id.

<sup>37</sup> Id.

*as a democratic institution: the possibility of excluding judges must not result in the inability of the Court to take a decision*<sup>38</sup>.

The opinion of the Venice Commission shows that all the constitutional judges, according to the Constitution of the Republic of Albania, should be subject to vetting law.

With an analysis over the second question, the Venice Commission clarified whether the principle of separation and balancing of powers is violated by allowing vetting procedures to be carried out by institutions under the executive branch, such as the High Inspectorate of Declaration and Audit of Assets and Conflict of Interest (“HIDAACI”) and Classified Information Security Directory (“CISD”). The Venice Commission emphasizes that the involvement of institutional bodies such the HIDAACI and CISD does not constitute any violation of the check and balances mechanism, both in the investigation process and in the initial research for evidences, since the evaluation and assessment of any information or evidence gathered by those executive bodies is in the competence of the Independent Commission and the Appeal Chamber. As argued by the Venice Commission and in accordance with Article 4(1 & 2), 33(5), the executive bodies are merely responsible for the preparation of reports, with the final decision always in the hands of the Independent Commission or the Appeal Chamber.<sup>39</sup>

The assessment of each piece of information gathered by CSID or HIDAACI - not acting as a replacement for a final decision - is then evaluated by the Independent Commission and the Appeal Chamber, independent institutions established by the Assembly.<sup>40</sup> On this basis, it can be concluded that although the HIDAACI and CISD are established from the executive branch, they do not interfere with judicial power, given their ‘instrumental and subservient functions’ in the reevaluation process.<sup>41</sup>

The third question presented to the Venice Commission examined whether the inability for judges and prosecutors to challenge the decisions of the re-evaluation institutions before domestic courts is in breach of Article 6 of ECHR (The Right to a Fair Trial). The Venice Commission asserted that the Appeal Chamber can be considered as a specialized jurisdiction (para. 63 of the Final Opinion) and does provide extensive rights and safeguards to people possibly affected by the re-evaluation procedure.<sup>42</sup> Article Ç of the Annex clearly obliges the Appeal Chamber and the Independent Commission to guarantee a right to a free and fair trial. In addition, a presupposition of dismissal must be established in certain occasions, which the judge under procedure shall prove wrong.<sup>43</sup> What is more, all of the re-evaluation institutions must act in full transparency with free and public hearings. As stated in Article F (3) of the Annex, the Appeal Chamber has no competency in determining whether the pillars of the re-valuation process are constitutional; there is no principle both in the Constitution and in the Vetting Law that excludes a possible application of Article 145 of the Albanian Constitution in the vetting process.<sup>44</sup> In other words, if the Appeal Chamber finds out about the unconstitutionality of the law that it is about to implement, it shall pass the case to the Constitutional Court and, in case of lack of limitations both in the Constitution and the Law, it

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<sup>38</sup> Id.

<sup>39</sup> Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ”, Adopted by the Venice Commission, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>40</sup> Id. at p. 9-11

<sup>41</sup> Id.

<sup>42</sup> Id. at p. 11-13

<sup>43</sup> Council of Europe (2016), “Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ”, Adopted by the Venice Commission, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>44</sup> Id.

appears that there is nothing that would stop the Court to take into consideration such complaint.<sup>45</sup>

In conclusion, there are sufficient elements throughout the Constitution and the Vetting Law to allow the Constitutional Court the possibility to assert that the Appeal Chamber may be considered a specialized juridical entity, in agreement with the scope of Article 135 of the Albanian Constitution (the Courts). According to this interpretation, it can be assessed that the Appeal Chamber guarantees a just and free trial to any person affected by the vetting process who wishes to appeal his/her case to a higher court.

Lastly, the fourth and last question examined whether the law provisions in relation to the background assessment of the assesses are in contrast with Article 8 of the ECHR, in respect to private and family life of judges and prosecutors.<sup>46</sup> Article 8 of ECHR provides a right to respect for one's "private and family life, his home and his correspondence subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'".<sup>47</sup> However, the second paragraph of article 8 of ECHR states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>48</sup>

In this case, inappropriate relationships between judges and prosecutors with individuals involved with organized crime put under threat national security and public safety. In addition to this, the purpose of the vetting law is to ensure the safeguards of the rights through the "re-establishment of the proper function of the rule of law and true independence of the judicial system, as well as public trust and confidence in these institutions," (Article 1 of the Vetting Law), therefore the investigation of such contacts is justified. The assessment is under the full supervision of the Independent Commission and subject to the control of the Albanian Appeal Chamber.

However, it must not be disregarded in any way the intrusive nature of the background assessment of the assesse. Nevertheless, the resulting interference must not exceed what is required by the legitimate aim pursued. In the case of Albania, these limitations "may be justified by the present situation of the Albanian judiciary, which requires special legislative interventions."<sup>49</sup> The background assessment cannot be regarded as an unjustified interference with the private or family life of judges and prosecutors and therefore it is in compliance with ECHR.<sup>50</sup>

In conclusion, through this *amicus curiae*, the Venice Commission does not aim at obtaining a final position on the question of the constitutionality of certain provisions of the Vetting Law, but merely provides the Constitutional Court of Albania with material regarding the

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<sup>45</sup> Id.

<sup>46</sup> Id. at p. 14 - 16

<sup>47</sup> European Court of Human Rights (2010), "European Convention of Human Rights, Article 8", p 10, available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>48</sup> Council of Europe (2016), "Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ", Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>49</sup> Id.

<sup>50</sup> Id.

compliance of the provisions of the Law with European Standards aiming to facilitate the Court's consideration of these provisions under the Constitution of Albania.<sup>51</sup>

## V. Lessons learned from other Western Balkan countries for Albania

In many instances the implemented judicial reforms in Western Balkan Countries had little impact in raising transparency, accountability and efficiency within the judicial system.

BiH has undertaken reappointment model in order to vet judges and prosecutors during the period of 2002-2004 which has served as a tool to restructure the court system.<sup>52</sup> The review and reappointment process of judges and prosecutors both involved background investigation and past conduct assessment. The reform consisted of reappointment process of all judges and prosecutors declaring judicial and prosecutorial posts as vacant and a procedure to fill these posts on the basis of merit.<sup>53</sup> Almost 1000 job posts were declared vacant and an open competition was set to fill them. The institutional reform included the set-up of three High Judicial and Prosecutorial Councils (HJPC), made up of international and local personnel, which restructured the Bosnian court system and reappointed all judges and prosecutors.<sup>54</sup> The need to vet judges was mainly driven by the widely-perceived pattern of corruption and incompetence spread throughout the system.<sup>55</sup> The removal of war criminals was a pivotal condition to reestablish trust in the police, the courts, and prosecutor's offices.

However, such reappointment lacked clear criteria and transparency and it is difficult to ascertain which was the main criteria used to block the appointment of a public officials.<sup>56</sup> Moral integrity, technical skills, qualifications, property & financial status and war crimes record, were all key criteria difficult to assess lack of transparency and accountability from the weak Bosnian institutional architecture. Inefficiency and lack of transparency proved, once again, to be an effective combo for a modest result.<sup>57</sup> The whole process underwent phases of difficulties such as the political interference by nationalist of political parties who attacked the objectivity of the councils, followed by the low number of applicants to replace former public employees. The reappointment process resulted in the closure of several courts, about 30% of the applicants not being reappointed, and the pre-war ethnic balance was restoring at its large.<sup>58</sup> Although it is not yet clear whether public trust in the judiciary has increased as a result of this process, but according to the EU progress reports the integrity of the judiciary remains to be strengthened.<sup>59</sup>

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<sup>51</sup> Council of Europe (2016), "Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ", Adopted by the Venice Commission, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e)

<sup>52</sup> Justice as Prevention, Alexander Mayer-Rieckh & Pablo de Grieff, Pg. 28

<sup>53</sup> Justice as Prevention, Alexander Mayer-Rieckh & Pablo de Grieff, pg 199

<sup>54</sup> Id. pg. 202

<sup>55</sup> David Pimentel (2008), "Restructuring the Courts: In Search of Basic Principles for the Judiciary of Post-War Bosnia and Herzegovina", Chicago Journal of International Law, Volume 1 Number 1, available at: <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1458&context=cjil>

<sup>56</sup> Aucoin, Louis/Babbitt, Eileen (2006): "Transitional Justice: Assessment Survey of conditions in the Former Yugoslavia", UNDP Belgrade report, available at: [http://www.undp.org/content/dam/serbia/Publications%20and%20reports/English/UNDP\\_SRB\\_TRANSITIONAL JUSTICE - Assessment Survey of Conditions in the Former Yugoslavia.pdf](http://www.undp.org/content/dam/serbia/Publications%20and%20reports/English/UNDP_SRB_TRANSITIONAL JUSTICE - Assessment Survey of Conditions in the Former Yugoslavia.pdf)

<sup>57</sup> Id.

<sup>58</sup>Vetting Judges, Police and Prosecutors in Bosnia and Herzegovina, available at:

<http://issat.dcaf.ch/Learn/Resource-Library/Case-Studies/Vetting-judges-police-and-prosecutors-in-Bosnia-and-Herzegovina>

<sup>59</sup> Progress Report Bosnia (2016)

Similarly to Bosnia, Kosovo in 2009 under the supervision of EU Commission Liaison Offices has carried a reappointment process of judges and prosecutors, aiming to establish an independent and professional judiciary and prosecution service to administer the judicial system in a professional and transparent manner, thus building public confidence and trust in local justice. As a result of this process, 898 judges and prosecutors became part of a re-evaluation process, with only 50% of judges and prosecutors in office passing the ethics test and professional test, thus obtaining the re-appointment as a judge or prosecutor.<sup>60</sup> However the process did not pass without critics for being politically influenced.<sup>61</sup> A flaw in the process was also the absence of four basic laws: Law on Kosovo Judicial Council, Law on State Prosecutor, Law on Courts and Law on Prosecution.<sup>62</sup> Little progress is made in regard to strengthening the integrity and efficiency of the judiciary as a result of this process, which proves that the vetting process conducted in 2009 did not have an everlasting effect in the judiciary.

At the same time, the Republic of Serbia does not present itself as a regional role model in respect to vetting procedures. The government has failed to design a comprehensive vetting process and institutional restructuring, although the basic legislative conditions and founding stones for vetting have been created. Lack of political will has been one of the major reason that has caused a failure in implementing properly vetting procedures.<sup>63</sup> Lastly, in the neighboring country of Croatia, vetting measures have also failed to date, with only two legislative proposals, related to abuses committed during the Communist era, with neither of them passing.<sup>64</sup>

It is thus easily assertable that vetting must be viewed as a complex process which needs to take into consideration political will, socio-economic context, timing, resources needed and sustainability of the process, taken that there is no “one size fits all” model. The conditions of the process must be evaluated properly and the risk of undesirable consequences should be taken into consideration prior to the implementation of the vetting as an institutional measure. At last, such institutional measures must be repeated after a certain period of time, in order to ensure its sustainability and effectiveness.

## VI. Concluding Remarks

The vetting process in Albania, although it started with a large degree of optimism and hope, must not be viewed as an institutional asset that will magically wipe clean the entire judicial system from corruption. While the vetting law will serve to oversee the lawful exercise of the judges and magistrates’ duties in general, in order to ensure a sustainability and effectiveness of the vetting as an institutional measure, a more comprehensive and structured approach is needed. Vetting as a stand-alone measure is not sufficient to ensure the effectiveness of the reform in order for the human right abuses to not be repeated. Filtering the judicial system requires removal of political interference in and partisan control from public institutions and the establishment of operational independence as well as public accountability. In this regard, Albania must take into consideration the possibility that reappointment procedures could make room for political interference by the executive branch in independent institutions in charge of

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<sup>60</sup> OCSCE (2012), “Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions”, p 14-17, available at: <http://www.osce.org/kosovo/87138?download=true>

<sup>61</sup> Reappointment process, independence and influences, KLI, available at: [http://kli-ks.org/wp-content/uploads/2015/05/Reappointment\\_process\\_independence\\_and\\_influences.pdf](http://kli-ks.org/wp-content/uploads/2015/05/Reappointment_process_independence_and_influences.pdf)

<sup>62</sup> Process of reappointment, independence and impact, KLI, available at: <http://kli-ks.org/en/process-of-re-appointment-independence-and-impacts/>

<sup>63</sup> Maja Kovac (2007), “Vetting as an element of institutional reform and transitional justice”, Institute of Criminological and Sociological Research, Belgrade, available at: [http://www.academia.edu/2565556/Vetting\\_as\\_an\\_Element\\_of\\_Institutional\\_Reform\\_and\\_Transitional\\_Justice](http://www.academia.edu/2565556/Vetting_as_an_Element_of_Institutional_Reform_and_Transitional_Justice)

<sup>64</sup> Id.

vetting procedures, leaving a governance gap while the process is ongoing. The vetting must not serve political purposes or to be used against political opponents for voting as it was the case with The DeBa'athification program in Iraq.

Some of the Western Balkan countries have undertaken institutional measures to remove corruption practices from judicial institutions. Although most of their measures warrant a generally positive assessment however they didn't seem to have an everlasting effect in increasing the integrity of judiciary. The reappointment process of judges and prosecutors in Kosovo didn't go without political interference despite being under the oversight of international actor. Lack of transparency and specific criteria have also characterized the reappointment process of judges and prosecutors in BiH.<sup>65</sup> The failure of Serbia and Bosnia and Herzegovina in the overall successful implementation of the vetting process finds its roots in weak and misleading data and information (politically altered) obtained during the background assessment.<sup>66</sup> Albania should then learn from the mistakes committed by its regional neighbors and be overly cautious by not allowing the misuse of protected data driven by political motivations. Albania should thus make sure to establish a sustainable institutional machine able to allow its enforcement bodies to be fully professional and independent. Personnel of these bodies should then be selected according to criteria clearly defined by the law which will guarantee their objectivity and impartiality.

The vetting law, as cruel as it seems for corrupted judges and prosecutors, it grants the possibility of resignation for judges and magistrates no later than three months from the entry into force of the law, which was viewed a 'free pass' to all judges or prosecutors that resigned in time, escaping, *de facto*, from the evaluation and assessment process. To this regard, the resignation of personnel must be viewed as an indicator that must oblige criminal prosecution bodies to investigate their past actions related to their assets and connections with organized crime. The vetting law process should also include a provision offering guidelines on how to handle judges and prosecutors if they refuse to declare their assets but do not resign. At the moment, the whole institutional machine and the framework of the vetting law has been silent in regard to this issue.

Furthermore, Albania, in order to renew the public trust in judiciary, needs to thoroughly inform and explain to the public every aspects of the overall vetting process. Transparency and consultation about its objectives will help in building public confidence in the reform and in ensuring that it will effectively responds to the actual needs of the Albanian society.

The vetting process in Albania must not be seen as a concluded task or as a box-ticking reform, but as a founding stone in order to build a fair, impartial and independent judiciary. The vetting process should serve as a measure to restore the public trust in the judicial system and to put Albania on the right path toward EU integration. It is thus assertable that the vetting process will be considered as an efficient process only when the legislative and the executive bodies, as the two other pillars of state power, are perceived by the public as bodies free of corruption.

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<sup>65</sup> Courting Democracy in Bosnia and Herzegovina, Lara J. Nettlefield.

<sup>66</sup> Council of Europe (2016), "Albania Amicus Curiae Brief For The Constitutional Court On The Law On The Transitional Re-Evaluation Of Judges And Prosecutors(THE VETTING LAW) ", Adopted by the Venice Commission, available at:

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