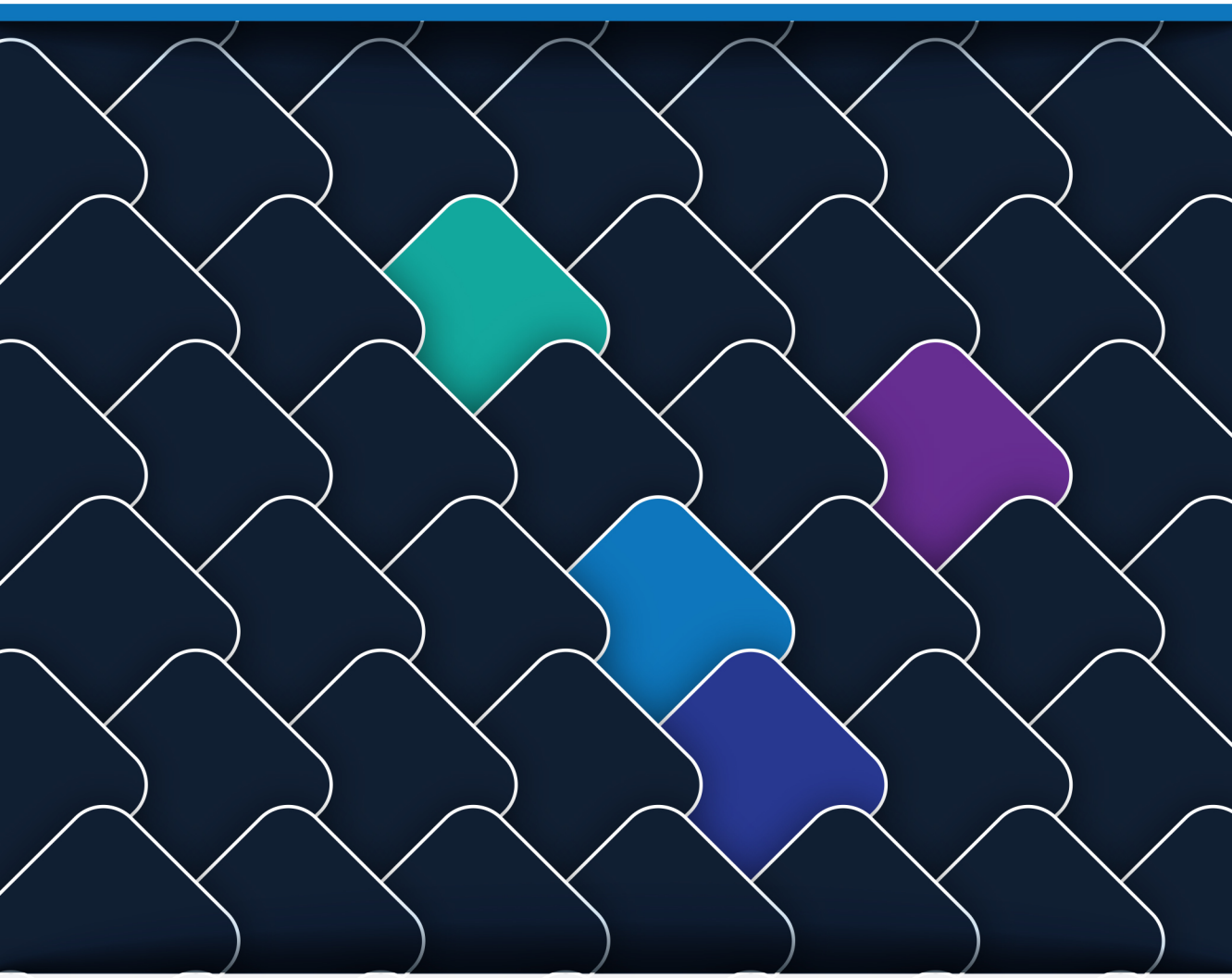
ЦЕНТАР ЗА ПРАВНИ
ИСТРАЖУВАЊА И АНАЛИЗИ
CENTER FOR LEGAL RESEARCH AND ANALYSIS

Kingdom of the Netherlands
THIS PROJECT IS FUNDED BY THE KINGDOM OF THE NETHERLANDS



VETTING OF JUDGES IN YOUNG DEMOCRACIES

COMPARATIVE ANALYSIS OF VETTING IN ALBANIA, BOSNIA and HERZEGOVINA, SERBIA, AND MACEDONIA

VETTING OF JUDGES IN YOUNG DEMOCRACIES

COMPARATIVE ANALYSIS OF VETTING IN ALBANIA, BOSNIA and HERZEGOVINA, SERBIA, AND MACEDONIA

VETTING OF JUDGES IN YOUNG DEMOCRACIES

COMPARATIVE ANALYSIS OF VETTING IN ALBANIA, BOSNIA and HERZEGOVINA, SERBIA, AND MACEDONIA

Publisher:
Centre for Legal Research and Analysis - Skopje

For the publisher:
Lidija Stojkova-Zafirovska, President of CLRA

Authors:
Lidija Stojkova-Zafirovska,
Zharko Hadji-Zafirov,
Martin Sopronov

Graphic designing and printing:
Relativ

May 2018, Skopje

The Project "Comparative study on vetting experiences in judiciary in emerging democracies" is supported by the Embassy of the Kingdom of the Netherlands. The content of this publication does not necessary reflect the position or the opinions of the donor.

CONTENTS

I. SUMMARY

This analysis is to provide insight into the practices of the countries in the region that, in the judicial reform process had undertaken specific steps towards a thorough and comprehensive review of the state of play in this field, implementing review mechanisms to cleanse the system from corruption and partisanship as well as mechanisms for vetting and reappointment of judges, in the process of constructing a new recruitment system in the judiciary as a result of the undertaken reforms of structural or legal character. What these countries have in common is their commitment to join the European Union as soon as possible, and at the same time, they are presented with numerous challenges related with the quality of the justice administration system, which, once overcome, would guarantee judicial independence, implementation of mechanisms for protection of the judiciary from undue influences, and increased level of public trust in the judiciary.

Consequently, the comparative approach does not prefer one approach over the other, but puts in the foreground the main points of the success or failure derived from the experiences of the countries in the region that are faced with the same or similar challenges in the process of reforming their justice systems. The successes or failures in the implementation of the mechanisms for **judicial vetting** are largely presented through the prism of the established standards and principles of the EU and the international legal order, which are generally accepted and serve as a roadmap to guide young democracies on their way to the EU and NATO integration.

The Republic of Macedonia is standing on an important crossroad in its development and has to deal with a number of important issues in the reforming of the judiciary which the majority of the public does not trust and views it as the generator of and main participant in the degenerative processes that continue to accompany the Macedonian society. At the same time, strong declarative commitment is expressed for speeding up the process of accession to the European Union; however, clear decisiveness must be demonstrated for implementing essential reform in the judicial system, accompanied by steps and actions that would ensure judicial review through transparent, precise, and equitable criteria for the purpose of a cathartic transition towards a more equitable, more efficient, and more stable modern judicial system.

In order to be able to implement these reforms, it is necessary that the representatives of the government and judiciary as a whole secure a consensus about the range and depth as well as duration of these measures that are to cleanse the system and establish sustainable and applicable criteria for practicing the judicial function measures that would follow the global trends and meet the demands and expectations of the domestic public.

Therefore, the objective of this study is to contribute to the debate and help the efforts in responding to the challenge presented before the entire judiciary today, and that is choosing a judicial vetting model that could be designed for the Republic of Macedonia, based on the experiences of the countries that have already undertaken more bold and more decisive steps in recent history, for dealing with undue behavior from individuals in the judiciary who have either abused their function or are not suitable to bear it, but due to their tenure, constitutionally guaranteed, remain in the judiciary and threaten the entire judicial system of the Republic of Macedonia.

II. INTRODUCTION

The vetting process does not have a unified definition which could serve as a basis for making a distinction between *review*, *reevaluation, reappointment,* and *re-election*. In principle, vetting is generally linked with institutional reform and the measures of transitional justice. Often, this absence of a precise definition, due to the lack of attention and efforts invested in the term, does not allow for a clear distinction between vetting, mass dismissals, and political retaliation.[1]

In practice, distinctions are made between **review**, or reevaluation, and general **re-election** (reappointment) of judges. These are two different approaches with the same objective, which is to handle corrupt and inadequate judges. Vetting as a process is associated with the first approach, as it is linked, as a measure, to the individual responsibility of those involved in past abuses (of human rights). Thus, the goal of assessing individual responsibility and individual integrity through the vetting mechanism is to establish whether past behaviors of and actions by an individual represent a serious danger and whether the individual could be removed from the public institution (function) on that account.

Yet, vetting must take into consideration the different contexts, both historical and political, in order to undertake the most appropriate vetting strategy that would be most acceptable and applicable in the specific case. The measures of transitional justice can refer to prosecutions for past abuses, such as war crimes, unearthing past crimes, reparation of the victims of said crimes, and reformation of the institutions involved in the abuses.[2] However, even though this refers to past cases, the range is much broader and allows for reviews of the capacity and integrity of new public function candidates as well. Due to this, vetting in fact refers to an integrity review process the goal of which is to determine the adequacy and suitability for public service.

On the other hand, **reappointment (re-election)** adopts a contrary approach to the vetting (review). First, the institution is abolished, all judges are dismissed, and then a new one is established and a **general call is announced for all positions** in order to select the most suitable candidates for the functions. In this process, all former employees have to apply for their former post as well if they want to be reappointed to that position, but new candidates are in competition for those positions as well.

And while the objective of the reevaluation is to remove from office those bearers of public function who have been proven to be inadequate and lack the integrity and capacity to bear the function, the objective of the reappointment process is to choose the most suitable candidate for office.

This research, with regard to the vetting models from the region and beyond, focused on examples taken from transitional democracies (such as Albania, Bosnia and Herzegovina, and Serbia) which have designed and carried out reevaluation and general reappointments of judges within the implementation of a comprehensive judicial reform. Their experiences

1 Maja Kovac, *"Vetting as an Element of Institutional Reform and Transitional Justice", Zbornik IKSI, 1-2/2007* Institute of Criminological and Sociological Research, Belgrade, 2007

2 According to the definition of UN Secretary-General, vetting in post-conflict scenarios usually is "[...] *a formal process for the identification and removal of individuals responsible for abuses, especially from police prison services, the army and the judiciary*[...]".(Source: *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)

can be of assistance in the application of a similar model in the Republic of Macedonia, one that would suit its needs and goals best and would take into consideration the mistakes, advantages, and challenges that have arisen from this process for the countries that are the subjects of this analysis.

III. COMPARATIVE REVIEW

ALBANIA
Background information

The Albanian Parliament in July 2016 unanimously adopted judicial reforms demanded by the EU and designed to cleanse the justice system of corruption and political influence. The judicial reform remained essential in Albania's EU accession process and could trigger other necessary reforms.[3] Albania adopted its cross-sectorial Justice Strategy for 2017-2020 and respective Action Plan in November 2016. Along with other key priorities, the judiciary in Albania is currently undergoing a comprehensive reform in the judiciary, implementing a transitional and temporary re-evaluation process (vetting[4]) of judges and public prosecutors. Vetting in Albania has emerged from the need to eradicate corruption and restore the faith of Albanian people in the judicial system. The vetting was launched in July 2016, with the 17 Constitutional amendments aiming to enforce professionalism across the sector, promote the values of independence and impartiality and increase public trust in the judiciary.

The "Vetting" Law

Based on Articles 81, 83 paragraph 1, and 179/b paragraph 10 of the Constitution, upon the proposal of a group of Members of the Assembly, the Parliament of Albania on 30 August 2016 adopted a new *Law on the transitional re-evaluation of judges and prosecutors in the Republic of Albania*[5] (known as the 'Vetting Law'). The vetting law[6], was voted by all 140 members of parliament, after long negotiations between the three main political leaders, closely monitored and supported by the international community. The aim of the law is to check the professional preparedness of Albanian judges and prosecutors, their moral integrity and the level of independence from organized crime, corruption, and political influence.

According to Article 1 of this law, its purpose is "*to determine specific rules for the transitional re-evaluation of all assessees, in order to guarantee the proper function of rule of law and true independence of the judicial system, as well as the restoration of public trust in the institutions of such system* [...]" and, according to Article 2, the scope of the law is: to provide for the organization of the re-evaluation process in particular for all judges and prosecutors[7] (par. 1); the methodology, procedure and standards of the re- evaluation process (par. 2); the organization and functioning of the re-evaluation institutions (par. 3); and the role of the International Monitoring Operation, other state organs and of the public in the re-evaluation process (par. 4).

3 As Stabilization and Association Council (SA Council) between Albania and the European Union concluded on its ninth meeting held on 15 November 2017.
4 "Vetting" (English), examining something or someone carefully to ensure its acceptability and suitability.
5 Law No. 84/2016 (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e)
6 Law for the transitional revaluation of judges and prosecutors in the Republic of Albania no. 84/2016, dated 30.8.2016.
7 According to the Law: 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.

The process of vetting (re-evaluation) is based on **three** main assessment pillars: professional ability (proficiency); asset verification (performed on all assessees, as well as on all their close relatives for wealth accumulated in Albania and abroad); and independence from organized crime, corruption and political officials (background assessment).

The role of the International community in the vetting process

Under the amended Constitution there is also a clearly defined role that the International community is playing in the vetting process. Namely the highest act regulates the deployment of a team of senior experts in law from EU member countries and the United States[8] - called the *International Monitoring Operation*[9] (IMO), representing the international observers aimed at supervising the vetting process in Albania. The monitoring of the vetting process has been envisaged as a continuing effort, which will last only until all relevant members of the judiciary undergo the necessary re-evaluation of their qualification and integrity. However, the IMO has no executive functions, the re-evaluation is carried out by the domestic vetting institutions. The vetting law envisages that the IMO will compile a list of recommended candidates for the two bodies (vetting institutions) that will vet the justice officials and this makes it very difficult for political parties to dismiss these recommendations. For these reasons, the presence of the international factor in the process was viewed positively and as multifaceted[10], as it puts additional guarantees that could contribute towards increased public trust in the justice reform. The IMO started the work on February 8, 2017 assessing the files of around 190 candidates who have applied to work for the vetting commission and its appeal board, and contributing with its own recommendations on those that was to serve on the two vetting bodies.

Key vetting Institutions

Under the Art. 179/b, paragraph 5 of the Albanian Constitution and the respective vetting law, the key vetting institutions, i.e. the first instance Independent Qualification Commission, the Appeals College/Chamber, and the two Public Commissioners, were voted in June 2017. The two key institutions will decide on the final evaluation of the assessee, based on one or several components or based on an overall evaluation of all of three key components[11]. The decision shall be based on one or several components or based on an overall evaluation of all of three key components.

8 The eight experts from Belgium (1), Italy (1), Bulgaria (1), Croatia (1), Netherlands (2), Sweden (1), and US (1), Source: https://exit.al/en/2017/09/23/who-are-the-8-international-vetting-observers/

9 In February 2017, a mission made up of EU and US legal experts was composed to oversee the setting up of bodies that will vet around 800 Albanian justice officials to ensure they are competent and uncorrupt.

10 http://www.mondaq.com/x/550690/Constitutional+Administrative+Law/Role+Of+International+Actors+In+The+Vetting+Process The support and monitoring of the international observers is exercised in three ways:The first - participating in the investigation and the evaluation of all the necessary facts and circumstances, which may result in specific charges toward the subjects of revaluation. The law grants to the International Observers the right to seek information from any individuals or legal persons; to verify the truthfulness and accuracy of the statements made by the subjects under revaluation. They may perform independent verification and present their findings in the form of a statement, report or document that constitutes evidence for proving a fact, circumstance or legal standard for the Albanian Institution in charge of the reassessment. They may also require from the Albanian Institutions to investigate for further evidence and also participate in the sessions called for the hearing of the subject of revaluation and has the right to interrogate they subjects under revaluation. The second - participating in the final stage of the evaluation and issuance of the decision by the Albanian Institutions, specifically by giving opinions in writing on a specific circumstance and participating in discussions between the Albanian Officials on the subjects under revaluations and finally by writing dissenting opinions, which are attached to the final Decision. The third - submitting written recommendations to the Public Commissioner for presenting an appeal, in the case they believe the final decision is not grounded. However, the recommendation may be given only by a panel of 3 International Observers.

11 Council of Europe (2016), "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

The EU welcomed this milestone and highlighted that this important success represents a step forward in the implementation of the justice reform in Albania[12]. According to the vetting law, the mandate of the Independent Qualification Commission will be to re-evaluate all the judges and prosecutors within its 5-year mandate. The complaints made by the subject of re-evaluation and public commissioners against the Commission's decisions will be assessed by the Appeals College at the Constitutional Court.

The view (Opinion) of the Council of Europe's Venice Commission on the vetting

In order to better understand the main principles on which the vetting process in Albania has been laid out and subsequently implemented, it is relevant to have an insight in the related Opinions of the European Commission for Democracy Through Law (the 'Venice Commission'), including: the *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*[13], the *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary*[14] *of Albania* and the *AMICUS CURIAE BRIEF for the Constitutional Court on the Law on the Transitional Re-Evaluation Of Judges and Prosecutors (The Vetting Law)*[15].

Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania

In its *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*[16], the Venice Commission examined, among other issues, the transitional qualification assessment of judges and prosecutors which provides for the process of vetting ("qualification assessment") of all sitting judges and prosecutors by specially created Independent Qualification Commission. As indicated in the Interim Opinion, the necessity of the vetting process is explained by an assumption that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures. After having underlined that such radical solution would be ill-advised in normal conditions, since it creates enormous tension within the judiciary and in particular, creates a risk of the capture of the judiciary by the political force which controls the process, the Venice Commission considered that a drastic remedy may be seen as appropriate in the Albanian context, as long as it remains an extraordinary and a strictly temporary measure. The Interim Opinion formulated a number of recommendations, including in particular, that the composition of the Independent Qualification Commission and status of their members should guarantee their genuine independence and impartiality and that judges should have the right to appeal to an independent body.

12 According to Genoveva Ruiz Calavera, Director for Western Balkans at the EU Directorate General for European Neighborhood Policy and Enlargement Negotiations, "the vetting process is so important for Albania that it can be considered a process of historic relevance, a defining moment for the justice system in the country, but not only. Strengthening an impartial, independent, accountable, efficient and truly professional judiciary has relevance also for a broader challenge to irreversibly consolidate the rule of law in Albania, once for all." (Source: https://europeanwesternbalkans.com/2017/12/01/vetting-process-leap-forward-implementation-justice-reform-albania/)

13 CDL-AD(2015)045 Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania (Adopted by the Venice Commission at its 105th Plenary Session, Venice, 18-19 December 2015), paras. 97-135 (CDL-REF(2015)038).

14 CDL-AD(2016)009, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania(adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016).

15 CDL-AD(2016)036 AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT (Adopted by the Venice Commission at its 109th Plenary Session , Venice, 9-10 December 2016)

16 CDL-AD(2015)045 Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania (Adopted by the Venice Commission at its 105th Plenary Session, Venice, 18-19 December 2015), paras. 97-135 (CDL-REF(2015)038).

Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary

Following the recommendations by the Venice Commission in the Interim Opinion, the *Ad hoc* Committee on Justice System Reform of the Albanian Parliament revised the Draft Amendments and re-submitted them to the attention of the Venice Commission[17]. The *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary*[18] has been adopted by the Venice Commission during its 6th March 2016 Plenary Session. In its Final Opinion, the Venice Commission reiterated that the vetting process was not only justified but necessary for Albania to protect itself from the scourge of corruption. It considered that the revised Draft Amendments have taken on board most criticism formulated in the Interim Opinion and welcomed in particular that the revised Draft Amendments created a separate appellate body (the Specialized Qualification Chamber) within the High Court, which is a sort of a specialized court (and not an *Ad hoc* extraordinary judge) as it is not created in a view of a single specific case and it is supposed to stay in activity during the whole duration of the vetting procedure[19]. The Final Opinion recommended in particular that the mandate of the vetting bodies should be reduced in length; judges of the appellate body, at the end of their mandate, should be able to integrate automatically the judiciary and that the judges and prosecutors undergoing vetting should enjoy the right to complain to the Constitutional Court about violation of their fundamental rights, with some reasonable exceptions dictated by the necessity of the vetting process.

After the adoption of the Final Opinion, further amendments were introduced to the Draft constitutional amendments which were finally adopted by the Parliament of Albania on 22 July 2016[20] with an overwhelming majority including the votes of the main opposition party.

Amicus Curiae Brief

Albeit the law was adopted with a consensus by the government and the opposition MPs in parliament, few months later the main opposition party (the Democratic Party) asked the Albanian Constitutional Court to declare the Vetting Law incompatible with the Constitution and the ECHR, and requested a suspension of the Vetting Law and its implementation until the final decision of the Constitutional Court[21]. The President of the Constitutional Court suspended the law and requested *amicus curiae* brief from the Venice Commission regarding the compatibility of the Law with the ECHR and the Constitution of Albania, summarizing the main arguments of the main opposition party for upholding their claims of unconstitutionality. This move of potential blocking of the started reform, experts believed, could jeopardize the country's chances of opening EU accession talks.

In its Opinion (*Amicus Curiae Brief)*, the Commission states that it doesn't have the intention of taking a final stand on the issue of the constitutionality of certain provisions of the "*Law on the Transitional Re-Evaluation of Judges and Prosecutors in the Republic of Albania*", but to provide the Constitutional Court of Albania with "material as to the

17 See, CDL-REF(2016)008, Consolidated version of the revised Draft amendments.
18 CDL-AD(2016)009, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania (adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016).
19 Final Opinion, para. 52.
20 See, CDL-REF(2016)064, Constitution of Albania
21 Final Opinion, para. 63

compatibility of the relevant provisions with European standards, so as to facilitate the Court's consideration of these provisions under the Constitution of Albania"[22]. It further emphasizes, that it is the Constitutional Court of Albania that has the final say on the binding interpretation of the Constitution and the compatibility of national laws with the Commission's Opinion. This means that in the decision on whether to consider the Amicus Brief lies within the discretion of the court prior to making an informed decision about the constitutionality of the challenged law.

The four questions[23] addressed to the Venice Commission by the Constitutional Court were related to the compatibility of certain aspects of Law no. 84/2016 with the Constitution and Article 6 and Article 8 of the ECHR as well as on whether the involvement of the judges of the Constitutional Court, who are themselves subject of the vetting procedure, in the examination of the constitutionality of the Vetting Law may be considered as a conflict of interest which requires their disqualification/recusal.

The Commission's response concerning the issue of conflict of interest and the possible disqualification of constitutional judges in the vetting process, was that it is understood that all judges including the constitutional judges will undergo a vetting process, and that "the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation". The Commission qualifies this situation as an "extraordinary circumstance" for the Constitutional Court "which may require departure from the principle of disqualification in order to prevent denial of justice"[24].

Further on, in considering the issue of involvement of the executive power in the process of re-evaluation of judges and prosecutors with regard to the principle of independence of the judiciary, the Commission found that the Vetting Law regulates that: "despite the involvement of bodies[25] in the investigation process and the initial research for evidence, the evaluation and assessment of any information or evidence gathered by those executive bodies rests with the Independent Commission and the Appeal Chamber which possess both the characteristics of judicial bodies and have the power to verify themselves the evidence gathered by the executive organs". On this basis, the Commission concludes that the system put in place by the Vetting Law does not as such provide interference with the judicial powers.

As to whether the lack of possibility for judges and prosecutors undergoing the vetting process to challenge the decisions given by the re-evaluation institutions before domestic

22 CDL-AD(2016)036 AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT, (Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016)

23 1) Given the fact that all the judges of the Constitutional Court are subject of the law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", might their participation in the examination of this case be considered as a conflict of interest? 2) Does this law respect the fundamental principles of the rule of law and the separation and balancing of powers? Is the independence of the judiciary endangered by the involvement in the process of re-evaluation of judges and prosecutors of the organs under the control of the executive power? 3) Is the law in conformity with Article 6 of the ECHR, regarding the respect of the right to fair trial? Is the denial of the right of judges and prosecutors subject to the law on re-evaluation to be addressed to domestic courts contrary to Article 6? 4) Are the law provisions in relation to the background assessment of the assessees contrary to Article 8 of the ECHR, as concerns the respect to private and family life of judges and prosecutors?

24 Ibid

25 Such as The High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest (HIDAACI) or Classified Information Security Directorate (CISD)

courts is in breach of Article 6 ECHR, the Venice Commission considers that the existing legislative and constitutional framework provides sufficient elements in order to conclude that the Appeal Chamber can present genuine guarantees to the persons affected by the vetting procedure[26].

On the issue raised by the Court on whether the provisions of the law concerning the background assessment are contrary to Article 8 ECHR, the Venice Commission founds that the "background assessment has the purpose to verify the declarations of the judges and prosecutors being assessed with a view to determining whether they had inappropriate contacts with persons involved in organized crime... As such this is a legitimate aim in view of the second paragraph of Article 8 ECHR (interests of national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others)". For the Venice Commission, the essential consideration is that the working group which has a main role in the background assessment and is composed primarily of security personnel, functions under the supervision and control of the re-evaluation bodies and that all the relevant material before the working group should be available to them.

Vetting process

The vetting law aimed to vet in a 5 year period around 800 judges and prosecutors[27] on their professional ability, moral integrity and level of independence from organized crime, corruption and political officials.

The asset assessment is considered as a major factor that has created the most resistance by judges and prosecutors, resulting in number of resignations from office to avoid procedures[28]. Namely, this component requires that an overall audit of assets is conducted, following a declaration, assessing the legitimacy of the source of their creation. The law[29] provides that the process 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. All judges and prosecutors are obliged 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. The process is designed in a way that many relevant institutions and auxiliary bodies[30] rely in obtaining information in order to verify the declared wealth in the country and abroad. . 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[31].

26 CDL-AD(2016)036 AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT, (Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016)
27 Albania has 408 full-time judges (13 per 100 000 inhabitants) and 336 full-time prosecutors (11 per 100 000 inhabitants)
28 An Analysis of the Vetting Process in Albania (www.legalpoliticalstudies.org)
29 Chapter IV (Art. 30-33) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e
30 HIDAACI, Financial Intelligence Unit or Ministry of Justice etc.
31 An Analysis of the Vetting Process in Albania (www.legalpoliticalstudies.org)

The background assessment involves verification of assessees' declarations and other data with the purpose of identifying assessees with inappropriate contacts with persons involved in the organized crime[32]. If the assessee is found guilty of having connection with organized crime groups or individuals, he/she will be dismissed from office unless proven otherwise.

Finally, the proficiency assessment evaluates assessees according to their ethical and professional activities in compliance with the law and the legislation that regulates the status of judges or prosecutors[33]. 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. This assessment will cover the organizational skills, ethics and personal qualities of all the assesses, based on standards foreseen by the law. At final, re-evaluation report on the assessed proficiency is issued based on the report of the Inspectorate, the information received from other sources, and on evaluation criteria of the legislation that regulates the status of judges or prosecutors and other legal acts. In the end, the following rates for the assessee are given: "competent", "deficient" or "inadequate". The "deficient" are recommended to attend a training program at the School of Magistrates, while those evaluated as "inadequate" for a certain skill are dismissed from duty.

Vetting - initial results

The process of vetting itself started after months of delay, related mainly to reactions from the leading opposition party in the country (the Democratic Party)[34], which as stated above, challenged the law in front of the Constitutional Court. The opposition accused the Albanian Prime Minister Edi Rama and his government of applying unconstitutional means and methods in order to impose the judicial reform in a way that would give them full control over the entire system. There were several elements that generated suspicions that there is a possibility that the vetting process is controlled by the executive branch, as government agencies[35] were in charge of controlling the investigations, including telecommunications and financial statements. As described before, the Venice Commission has rejected this argument stating that the final decision is ultimately made by the independent body (IQC), in view of the principle of separation and balance of powers. This collaboration between various bodies in the process of facilitation is mutually reinforcing and provides for more holistic and coherent approach to the transitional justice mechanisms[36].

The process finally kicked off with the Independent Commission analyzing the first priority dossiers, including "top priority" dossiers with the members of the Constitutional Court, the High Court President and the General Prosecutor. In January 2018 the IQC began the vetting process of judges and prosecutors, shortlisting 36 judges and prosecutors to be vetted[37]. In its press release the Commission stated that: "In accordance with the *Law No 84/2016 on Vetting Judges and Prosecutors in the Republic of Albania*", on January 15, 36 judges were shortlisted after casting lots the relevant subjects to be vetted and vetting procedures have already begun."

32 Chapter V (Art. 34- 39) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e
33 Chapter VI (Art. 40-44) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e
34 The Democratic Party leader, called the Law for Vetting prosecutors and judges a "Mafia process" and "witch hunt"
35 Reference to the Albanian National Security Authority, responsible for performing background assessment of judges and prosecutors, the HIDAACI, Financial Intelligence Unit or Ministry of Justice etc.
36 Mayer-Rieckh, A, "On Preventing Abuse: Vetting and Other Transitional Reforms", Justice as Prevention: Vetting Public Employees in Transitional Societies, Mayer-Rieckh, Alexander and Pablo de Grieff, eds. Social Science Research Council, New York, 2007, p. 483
37 As of January 2018 the IQC allocates to their respective rapporteurs a batch of 36 new cases every two months.

The remaining cases to be treated with priority (47 amongst the highest ranking members of the judiciary) were also already allocated to IQC. Their assessment is ongoing, in parallel with the review conducted by the IMO International Observers[38]. The auxiliary bodies (HIDAACI, and CISD) have made the necessary background assets and security checks and already delivered to the IQC and the IMO a significant number of dossiers, including all those related to all priority cases. The High Inspectorate at the High Council of Justice and the Ad Hoc Commission within the General Prosecutor's Office delivered the proficiency assessment for the top priority cases and they are advancing on delivering the reports on all remaining priority assessees[39].

The transformative role of the vetting process has already had knock-on effects in the judiciary. After the vetting kick off, many of the judges, prosecutors and legal assistants refused to submit their assets and patrimonies for verification. More than a hundred judges and prosecutors in Albania have resigned from office, "due to shifts in 'career focus' and/or worrisome 'health issues'"[40]. Initially, seven members of the judiciary resigned (one High Court judge, two judges, one prosecutor and three senior legal assistants). In 2017, one judge from the constitutional court and five judges from the High Court preferred to leave duty respectively at the end of their legal mandate, just before retirement; they were obliged to stay in office until the appointment of the successors and thus undergo the vetting and be placed amongst the priority dossiers, based on their role and functions[41]. Once the Independent Qualification Commission started to complete the first sets of investigations, two top ranking members of the judiciary resigned from service and requested their vetting to be terminated, these were a Constitutional Court judge and the former General Prosecutor.

The aftermath of the series of hearings implemented by the Commission, was dismissal of a Constitutional Court judge during March 2018, and then later in April a confirmation in duty of a Constitutional Court judge as well as dismissal of a judge at a Court of Appeal, who was also a candidate to the High Judicial Council. In addition, three judges have been dismissed following a final court decision convicting them. Five judges have been suspended from duty as a result of criminal investigations, pending a final court decision; out of these, the High Council of Justice decided also to suspend three judges of the Appeal Court of Durrës (one being also the Chair of the Court) based on a request from the Serious Crimes Prosecution Office, where they are under criminal investigation for abuse of power[42].

38 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf
39 Ibid
40 An Analysis of the Vetting Process in Albania (www.legalpoliticalstudies.org)
41 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf
42 Ibid

Vetting challenges and evaluations of the process

Apart from the main criticism from the opposition, the experts and the international community (i.e. the European Union) have also presented their reflections on the whole vetting process already taking place in Albania full steam.

The experts point out that the main challenges of the vetting as a stand-alone measure is not sufficient to ensure the effectiveness of the reform. The combat of the corruption in the judicial system requires impartial and non-partisan approach, and the establishment of operational independence as well as public accountability. Therefore, there is a concern that there is a possibility that reappointment procedures could allow political interference by the executive branch in independent institutions in charge of vetting procedures, leaving a governance gap while the process is ongoing[43]. It is of a paramount importance to establish a sustainable institutional mechanism that will provide the enforcement bodies to be fully professional and independent as well as to make sure that the composition of these bodies is with members selected by clearly defined criteria which will guarantee their professionalism, objectivity and impartiality[44]. The experts argue that the law grants the possibility of resignation for judges and magistrates *no later than three months from the entry into force of the law,* allowing all judges or prosecutors that resigned in time to "escaping, *de facto*, from the evaluation and assessment process"[45]. Furthermore, the experts argue that vetting law should also include a provision offering guidelines on how to deal in situations when judges and prosecutors refuse to declare their assets but do not resign, which presents another loop in the entire process.

There are views[46] that judicial reforms in Albania lack full consensus as regards the implementation laws and that instead, these reforms could institutionalize the problems giving the government of Edi Rama the possibility to extend his power on the judiciary. According to this view, this contradicts the fundamental principles of democracy and separation of powers, values advocated by the EU, which apparently "has accepted that some segments within its institutions support this scheme"[47].

The last EU Progress Report on Albania issued on April 17, 2018[48], found that: "*[…] good progress was made, in particular through the continuation of the justice reform and the adoption of the full legal package. The new legislation tackles many shortcomings related to the justice system's lack of independence, efficiency and professionalism. However, corruption is widespread and remains an issue of concern. The impact of various measures has yet to be seen […] Albania should in particular: → advance the implementation of justice reform. This should include completing the set-up of the new judicial structures (the High Council of Justice, the High Prosecutorial Council, the High Justice Inspector and the Justice Appointment Council) and achieving first results in the process of re-evaluating judges and prosecutors; → progress further in establishing a solid track record of investigations, prosecutions and convictions in combating corruption at all levels, including asset recovery; […]* The EC report noted that **the process of re-evaluating all judges**

43 An Analysis of the Vetting Process in Albania (www.legalpoliticalstudies.org)
44 Ibid
45 Ibid
46 https://www.neweurope.eu/article/albanias-vetting-saga-continues/ (by Beata Stur)
47 Ibid
48 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf

and prosecutors has started and is delivering the first tangible results. "*Following the establishment of the vetting institutions, the first set of priority cases is being reviewed. The auxiliary institutions supporting the process have completed their first reports on the proficiency assessments, background checks and asset declarations. Appeals against the vetting law and the related underlying legislation of the judicial reform have been adjudicated by the Constitutional Court. The latter confirmed the Vetting Law's constitutionality.*"

The EU encouraged that In the coming year, Albania should "…i*n particular achieve further results in the process of re-evaluating judges and prosecutors and finalize the creation of the new independent judicial institutions, namely the High Council of Justice, the High Prosecutorial Council, the High Justice Inspector and the Justice Appointment Council […]Once established, the new High Judicial Council and the High Prosecutorial Council should be responsible for approving the ethics rules and code of conduct and ensuring their monitoring.*

Overall, the EU marks the vetting process positively and as a transitory measure that made transformative (qualitative) change to the overall reform process in the judiciary. In this sense, the vetting entails not only identification and removal of individuals responsible for past abuses, but also aims at screening of integrity and capacity of new candidates for public[49]. As the vetting process was designed as vehicle 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[50].*

49 Maja Kovac, "Vetting as an element if Institutional reform and transitional justice", Zbornik IKSI, 1-2/2007 Institute of Criminological and Sociological Research, Belgrade, 2017

50 An Analysis on the Vetting Process in Albania (www.legalpoliticalstudies.org)

Along with other Western Balkans countries, Bosnia and Herzegovina was recognized as a potential candidate for EU membership during the Thessaloniki European Council summit in June 2003. Since then, a number of agreements between the EU and Bosnia and Herzegovina have entered into force51. The action plan of the 2014-2018 justice sector reform strategy, was adopted by the Council of Ministers in March 2017.

In the late 1990s and after the post-Dayton[52], the period was followed by resistance of the signatory political parties to implement the peace reforms; as a result, the public trust in the rule of law and in the institutions was very low. The international community[53] stepped in intensively in order to catalyze the processes of the so called - Security Sector Reform (SSR). The vetting process was one of the measures of the SSR to ensure minimum standards of integrity in public service in BiH. As the UN suggests, "vetting programs should prioritize the military, the civilian security sector, intelligence services, the judiciary, and other institutions that underpin the rule of law, such as the police". Vetting in Bosnia concentrated on security related sectors, as the impartiality of the police and the fairness of the judicial system were impaired. The vetting involved police forces, judiciary, candidates for the ministerial positions and army generals. This review was screening different grounds: moral integrity, qualifications, capacity, property and financial status, and war crime records.

A 'process of assessing the integrity to determine suitability for public employment', has been initiated in the period of 1999 and 2002, with great involvement of the United Nations Mission in Bosnia and Herzegovina (UNMIBH), which reviewed approximately twenty-four thousand law enforcement public servants (certification process). In addition, a reappointment process was launched between 2002 and 2004, by the High Judicial and Prosecutorial Councils (HJPC), composed of mixed international and national staff, and responsible for re-appointing judges and prosecutors, for almost all one thousand judicial and prosecutorial positions.

As argued by the vetting experts[54], the UNMIBH certification process and the HJPC reappointment process represent two distinct approaches to vetting[55]. While the certification process was reviewing process law enforcement personnel if they meet the certification criteria in order to stay in service, in the reappointment process, the courts and prosecutors' offices were reconstituted and there was a general competition for all posts[56]. The certification process aimed to remove servants who were found unfit for service, whereas reappointment process was to recruit and select for office the most qualified candidates for the job. Nevertheless, the both processes intended achieving an overarching institutional change as part of the reform agenda, dropping the narrow aim to focus on solely

51 Visa facilitation and readmission agreements (2008), Interim Agreement on Trade and Trade-related issues (2008). The Stabilization and Association Agreement (SAA) has been ratified and entered into force on 1 June 2015. In 2016 BiH submits its application to join the EU, and later the same year the EU Council invites the Commission to present an Opinion on BiH application (Source: https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en).
52 'The General Framework Agreement for Peace in Bosnia and Herzegovina' (The Dayton Agreement) signed in 1995, putting to an end to the 3 1/2-year-long Bosnian War.
53 Although the parties carried primary responsibility to implement the Dayton agreement, it designated a broad array of international organizations to assist the process.
54 Mayer-Rieckh, A.
55 Ibid
56 Ibid

individual responsibility for past abuses during the service, and creating fair, impartial and professional institutions. As pointed out[57], "efforts to build public institutions to prevent the recurrence of abuses should generally not be limited to excluding abusers, but requires comprehensive institutional reform, including a full review of personnel".

The certification process and the reappointment process in fact required the exclusion of war criminals from the police, the courts, and prosecutor's offices, as this removal was considered an important condition to restoring trust in the security sector, and to disable informal criminal networks that existed in these institutions. These processes, therefore, constitute transitional justice measures primarily in the sense that they aim to prevent future abuses, rather than to establish accountability for past abuses[58].

The vetting process of judges and prosecutors

For the purposes of this report, we will only focus on the vetting process conducted in Bosnia and Herzegovina on re-appointing judges and public prosecutors in the period of 2002-2004.

Justification

Bosnia and Herzegovina initiated a more serious judicial reform in early 2001 when the Independent Judicial Commission was established as the lead international agency to lead the reform process[59]. The new judicial reform strategy envisaged vetting the judiciary (re-appointment process), a need mainly driven by the widely-perceived pattern of corruption and incompetence spread throughout the system[60]. However, this measure was not foreseen only to ensure the suitability of judges and prosecutors, but also as a tool to improve the overall functioning of the judicial system, restructuring the court system, reducing its size and ensuring proportional ethnic and other type of representation in this sector. The great presence of international monitors definitely made it possible for BiH's public institutions to initiate vetting procedures.

The general reappointment faced strong criticism coming from mainly international experts arguing that it violates the independence of the judiciary and enables political interference, derogating the constitutionally guaranteed principle of irremovability. This re-applying for judicial positions and the possible removal from office of judges already enjoying life tenure, even though no individual misconduct had been established, was seen as constitutionally and legally challenging.

Yet, the prevailing arguments of the other experts were that the professional review process was created in order to clear the dysfunctional judiciary and allow a ground for real independence to take root. They also pointed out concrete goals that the reappointment process inevitably can bring forward: to implement the required restructuring of the court

57 Mayer-Rieckh, A., 2007, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York

58 Ibid

59 21 Mayer-Rieckh, A.

60 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

system, in particular the reduction of courts and judicial personnel, as well to undo structural injustices and implement necessary institutional reforms, such as modifying the ethnic or gender composition of a public institution, and facilitates the reduction or reassignment of personnel in the context of a consolidation or disbandment of public institutions[61]. To leverage this idea of the general reappointment in the judiciary, an Office of the Disciplinary Prosecutor was created to investigate complaints against judges and prosecutors, which would ensure the application of minimum due process standards for sitting judges and prosecutors[62].

Vetting Bodies

In 2002 the three main judicial bodies, made up of mixed international and domestic members, were established (one at the state level and two at the entity level): the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (the State Council); the High Judicial and Prosecutorial Council of the Federation of BiH (the Federation Council); and the High Judicial and Prosecutorial Council of the Republika Srpska (the RS Council)[63]. The national members of the councils were judges and prosecutors from all levels of the judicial and prosecutorial systems, as well as attorneys.

As independent bodies the Councils were responsible for selection, appointment, transfer, discipline, and removal of judges and prosecutors; in-service training and budgetary issues. During the transitional period 2002 - 2004, the councils were given the additional tasks of restructuring the courts and prosecutors' offices, including the reappointment of almost all judges and prosecutors[64].71 The IJC served as the secretariat of the councils during the transitional period, while they restructured the judicial and prosecutorial systems and implemented the reappointment process[65].

After the restructuring process, which resulted in closing more than 30% of all first instance courts, the optimal number of judges and prosecutors needed was calculated on the basis of the inflow of cases. This ended in reducing the number of judges also by almost 30%. Once the number of courts and prosecutor's offices, as well as the number of judges and prosecutors for each court and prosecutor's office, was determined, the councils were in a position to initiate the reappointment process.

Reappointment of judges and prosecutors - the vetting process

The respective entity Constitutions were changed in order to start he general reappointment of judges, removing the guarantee of life tenure for judges.

Subsequently, the reappointment process started enrolling, by announcing vacancies for judicial and prosecutorial posts inviting all professional lawyers to apply in an open competition. Sitting judges and prosecutors could re-apply for any open position.

61 Mayer-Rieckh, A., 2007, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York

62 Ibid

63 During its transitional period (2002-2004), the three councils together had a total of seventeen (17) national members, as well as eight international members, two of whom served as the president and the vice president.

64 Mayer-Rieckh, A., 2007, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York

65 Ibid

The reappointment process was carried out in phases and according to the rules the applicants were required to complete a full application package and provide a writing sample and copies of relevant certificates and diplomas[66].

As stated in the HJPC report (2004)[67] two thousand candidates (2,000) applied for a total of 953 posts. Most applied for more than one post resulting in around five thousand (5,000) applications. The public also put complaints against judges and prosecutors on incriminating conflict-related activities, but the volume of information that needed to be processed did not allow for extensive independent investigations of this information[68]. This resulted in inconsistency in the councils' appointment decision making, as they did not manage to conduct a comprehensive background review of conflict-related activities for all applicants, allowing for potential unsuitable judges or prosecutors to assume the public function.

The formed nomination panel (of the Councils) interviewed the applicants assessing the required qualifications. After receiving the recommendations of the nomination panel, the council decided on the appointment and announced its decision in public. Applicants had the right to review and comment upon their application dossiers. The equitable **ethnic representation**[69], in accordance with relevant constitutional and legal requirements, was observed. Sitting judges and prosecutors who were not reappointed generally filed requests for reconsideration. The mandate of a sitting judge or prosecutor who was not reappointed for office was terminated and they were provided with a financial reimbursement (six-month salary and benefits) after the ending of their mandate.

The aftermath of the vetting

The Final Report 2002-2004 of the HJPC resumes that the councils filled 878 out of total 953 judicial and prosecutorial posts (92%). The reasons for not filling the remaining 75 posts were apparently insufficient number of qualified minority candidates. About 30% of the serving judges and prosecutors who re-applied were not reappointed and about 18% of those appointed by the councils were external applicants. The vetting presented difficulty for some of the judges who decided to retire or because they did not want to undergo the reappointment process.

As a result of the vetting process, important benefits were gained in the overall justice system. Apart from the ethnic representation which significantly improved, it is considered that the transitory reform activities such as the restructuring of the courts and the implementation of the reappointment process contributed towards independent and professional judiciary as a paramount condition for the EU accession[70].

As far as the restoring the trust in the judiciary, as one of the principal reasons to conduct reappointment process, it is worth mentioning that according to reliable public opinion polls in Bosnia and Herzegovina, the confidence prior to the vetting in the judiciary was between 41% and 68.4% and during the reform period, the level of confidence in the judiciary increased to between 60.2% and 74.0%[71].

66 Ibid
67 HJPC, "Final Report. September 2002 – May 2004," November 2004, Annex 3, http://www.hjpc.ba
68 Ibid
69 Ethnic representation was determined in accordance with the last pre-conflict census in 1991.
70 Mayer-Rieckh, A., 2007, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York
71 UNDP Early Warning System in Bosnia and Herzegovina, Annual Report 2000

Final Remarks and lessons learnt

After almost 15 years from the implementation of the general reappointment process in the judiciary, Bosnia and Herzegovina hasn't still managed to build a strong and efficient, trustable system of judiciary, coping with corruption and slow progress of judicial reform. As argued by the analysts, once reappointments began to gain pace, nationalist political parties and lobbies began to vehemently oppose the process alleging that it violated their constitutionally guaranteed national interests and that the councils were biased in their decisions[72]. The elites' politics of instrumentalizing interethnic fear continued to undermine transformation and reform processes. This has marginalized the EU agenda as well as other democratizing/liberalizing agendas[73]. Since 2015[74], the adoption of laws by expedited procedures increased with the implementation of the new Reform Agenda.

The case of vetting in Bosnia and Herzegovina (2002-2004) is often perceived as a hallmark in the Western Balkan region. It arouse from the genuine need for fair and just system and institutional reform in the post conflict period. The attribution of this 'institutional dimension' is however something that is necessary to consider positively, as the vetting can have has huge institutional impact. As stated before, it is expected that a well-executed public servant reform could allow for detecting various malfunctioning of institution's employees and ensure the selection of integrity, competent and representative personnel[75]. Vetting processes set the integrity criteria for employment and assess suitability for employment. Criteria for employment define access to and exclusion from public positions. Defining and applying those criteria, then, not only affect the employment situation of individuals but also the future shape and personnel structure of the public institution in question. An institutional dimension is inherent to any vetting process[76]. However, why the restructuring of the judicial and prosecutorial systems was difficult to implement is also because Bosnia and Herzegovina suffered a serious brain drain during and after the conflict, there were not sufficient pool of qualified candidates for the open posts.

The international involvement in the whole reform, though, including the design and the participation in the vetting process, remains an important signature in this effort. A significant provision of funds and human resources, were necessary for the process to start and be implemented successfully and smoothly. This backstopping role of the international factor, augmented and speeded the effects, but could present a challenge on long-term basis for the beneficiary from sustainability point of view. Even though this international domination (interventionism) has been criticized for usurping the power of political elites, overriding democratic procedures and creating a culture of political dependency in BiH[77], it provided the subjects in charge (High Representative and the UN) with the powers to impose vetting processes on domestic institutions.

72 Mayer-Rieckh, A.
73 https://www.bti-project.org/en/reports/country-reports/detail/itc/bih/
74 The Stabilization and Association Agreement (SAA) has been ratified and entered into force on 1 June 2015.
75 Mayer-Rieckh, A., 2007, '***Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina***', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York
76 Mayer-Rieckh, A., 2007, '***Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina***', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York
77 https://www.bti-project.org/en/reports/country-reports/detail/itc/bih/

However, "when an internationalized vetting process is established, every effort should be made to involve domestic actors as broadly as possible, to ensure its integration into domestic law, and to put in place provisions guaranteeing a seamless changeover from the extraordinary transitional vetting process to regular domestic selection and recruitment procedures"[78]. It is resumed that the HJPC process was integrated into the domestic legal system and ensured a smooth transfer to a domestic follow-on mechanism[79]. At the completion of the reappointment process, the HJPC turned into a permanent appointment and disciplinary body. However, even nowadays it still faces many challenges. According to the last EU Progress Report on Bosnia and Herzegovina[80], in 2017, the HJPC adopted controversial conclusions that envisaged the possibility of dismissing judges and prosecutors on the basis of alleged past war-time activities without conducting disciplinary procedures, which were later replaced the previous ones with a view to complying with European standards. According to the Report, this illustrates the vulnerability of the judiciary to various types of pressure. The EU noted that "the judicial independence and prosecutorial autonomy must be further strengthened, including in practice and that politically motivated threats against courts and prosecutor's offices must be detected on time and properly addressed [...] The constitutional and legal framework remains weak as to the guarantees of independence, impartiality and autonomy of judges and prosecutors..".

A general reappointment (vetting) process, however, represents a risk of arbitrary interference in otherwise independently operating sectors[81]. It should therefore only be established when the institution is fundamentally dysfunctional; it should be implemented by an independent body that follows fair procedures; and it should be put in place as early as possible to avoid protracted periods of legal uncertainty.[82] In Bosnia and Herzegovina, those judges who were not reappointed argued that the reappointment process did not respect their constitutionally guaranteed national rights, in particular the independence of the judiciary[83].

Some analysts[84] consider that a failure of the Bosnian vetting law finds its grounds in the lack of clarity over the evaluation criteria (such as personal integrity, qualifications, competence, property and financial status, and war crimes record) and the lack of efficiency in conducting this process in a transparent and accountable manner, which delivered a modest result[85]Expert argue that these early efforts to vet judiciary collapsed, inter alia, due to a lack of qualified staff, inadequate resources, and insufficient time as the process was hugely resource-intensive[86].

78 Ibid
79 OECD (2017), Vetting judges, police and prosecutors in Bosnia and Herzegovina, DCAF ISSAT, available at: http://issat.dcaf.ch/Learn/Resource-Library/Case-Studies/Vetting-judges-police-and-prosecutors-in-Bosnia-and-Herzegovina
80 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf
81 Ibid
82 Ibid
83 Mayer-Rieckh, A., 2007, '*Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina*', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York
84 *An Analysis of the Vetting Process in Albania* (www.legalpoliticalstudies.org)
85 http://www.undp.org/content/dam/serbia/Publications%20and%20reports/English/UNDP_SRB_TRANSITIO NAL_JUSTICE_-_Assessment_Survey_of_Conditions_in_the_Former_Yugoslavia.pdf
86 Mayer-Rieckh, A., 2007, '*Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina*', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York

SERBIA
Background information

Of all Eastern European countries, Serbia was the last to cross the so-called minimal threshold of democracy, that is, the first transfer of power from the former socialist government to a democratic government. This delay had resulted from the specificity of the Balkan region, which was rattled by nationalist movements, primarily marked by authoritative and non-democratic governance. This manner of governance was ended a long ten years later when on October 5 of 2000, pressured by its citizens, Serbia embarked on its reformative journey to Europe by submitting in 2009 its application to join the European Union and was granted candidate status on March 1, 2012.[87]

In order to join the European Union, Serbia was brought before the challenge of radical reform in every segment of its political, societal, and economic systems. For the purposes of this report, we are going to focus on the judicial reform only, which began in post socialist Serbia in 2001, with the first set of judicial laws. In 2002 and 2003, amendments to said laws were adopted and these referred to the appointment and dismissal of judges and court presidents transferring broad authority to the judicial and executive power in this respect. In 2006, the new Constitution of the Republic of Serbia[88] was adopted and the *National Strategy for Judicial Reform* was published, while over the course of 2008 a number of laws were adopted as follows: *Law on Court Organization*, *Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutor's Offices* (i.e. the Judicial network), *Law on Judges*, *Law on the High Judicial Council*, *Law on Public Prosecution*, *Law on the State Prosecutorial Council*[89]... not considering the basic changes in all legal areas, we are going to pay special attention to the reforms affecting the judges implemented by the Serbian Government in 2009.

Reforms
New court organization

The *2008 Law on Court Organization* reduced drastically the number of courts in Serbia from 168 to 64. This Law established courts of general competence, as well: basic, high, and appellate courts (Belgrade, Novi Sad, Nish, and Kraguejvac) and the Supreme Court of Cassation as the highest judicial institution in the country. The Law also established courts of specialized competence, such as: commercial courts, commercial appellate court, misdemeanor courts, high misdemeanor court, and administrative court. The objective of the establishment of the new system, which began to function as of January 1, 2010, was to redistribute the backlog of cases and level the disparity between the overtaxed "urban courts" and the insufficiently exploited "rural courts".[90]

87 Revizija stanja u Srpskom pravosudji, Simon GABORJO i Hans-Ernst BOCER POČASNE SUDIJE, 2012 Beograd, p. 8

88 It should be noted that this Constitution soon after became subject to an opinion of the Venice Commission, in particular with regard to the existence of genuine independence of judges and prosecutors [See Opinion No. 405/2006, CDL-AD (2007) 004]. The Commission was "concerned that the Serbian Constitution did not provide sufficient guarantees for the independence of the judiciary which creates a risk of unduly politicizing the judiciary since the National Assembly elects the judges and the members of the High Judicial Council." Opinion CDLAD (2008) 007) adds "It seems that the Serbian Constitution is in infringement with the independence of the judicial system and is trying to politicize it since the National Assembly elects, without a qualified majority, the members of the High Judicial Council" CDLAD (2008)

89 Judicial institutions in Serbia, OSCE report, 2011 November, p. 1

90 Judicial institutions in Serbia, OSCE report, 2011 November, p. 1.

High Judicial Council (HJC)

Pursuant to Articles 156 and 157 of the Constitution, the High Judicial Council is an independent and autonomous body ensuring and guaranteeing the independence and autonomy of courts and judges. It has 11 members consisting of the President of the High Court of Cassation, the Minister of Justice and the President of the authorized committee of the National Assembly, as *ex officio* members, and eight electoral members elected by the National Assembly in compliance with the law. Of these electoral members six are judges holding the position of permanent judge and two are eminent lawyers with minimum 15 years of professional experience, of which one is a solicitor and the other a professor at a faculty of law. The office term of the members is five years. The HJC appoints and dismisses judges and proposes to the National Assembly the election of judges in the first election to the position of judge etc.[91]

General reappointment[92]

The *Law on Judges* adopted on December 22, 2008 and the 2006 Constitution envisaged the "general reappointment" of judges in which all sitting judges were allowed to participate. However, new candidates were given the opportunity to apply for the open positions as well: The status of the candidates that were to be appointed for the first time was uncertain, as they were being appointed for a period of 3 years (probation period), which could also be transformed into tenure following its expiration.[93]

Judicial Academy

The Academy was established in 2001 in order to provide continuous education and training to judges and prosecutors; however, academy attendance was not mandatory and it was not related with the career advancement of judges and public prosecutors.

With the new *2009 Law on the Academy* it was prescribed for the first time that judicial training was an integral part of the overall process of selection and recruitment of judges and public prosecutors in Serbia. The adopted law was a milestone in the reform process as it envisaged a completely new mode of selection and recruitment and beginner's training for judges and public prosecutors.[94]

General Reappointment of Judges
Reasoning behind the general reappointment

The process of general reappointment of judges in Serbia was initiated by the new *Law on Court Organization* which envisaged reducing the number of courts, which would automatically lead to reducing the number of judicial employees, i.e. judicial removal. It is unclear what the legislator's idea behind said reform was due to two reasons, as follows: one, why would they reduce the number of judges when in the 2002-2008 period the number

91 Устав Републике Србије, РС бр.37, 8 новембри, 2006

92 For the purposes of this analysis, we shall be using the Macedonian term „генерален реизбор" in order to bring it closer to the context in which it had been mentioned in the Republic of Macedonia by certain political subjects as a possible solution to the problems in the judiciary. In Serbian legislation we find the term "генерален избор", while the Venice Commission uses the term "reappointment".

93 Revizija stanja u Srpskom pravosudji, IZVESTAJ SACINILI Simon GABORJO i Hans-Ernst BOCER POČASNE SUDIJE, 2012 Beograd, p. 10

94 Judicial institutions in Serbia, OSCE report, 2011 November, p. 3.

of cases in the courts increased by 54%? The Judges' Association of Serbia requested an official response to this question from the High Judicial Council, however, a clear answer was never provided[95]; and two, considering that this reform places the biggest part of the burden on the courts of general competence – in Serbia, formerly the municipal courts, and presently the basic courts – why would they reduce the 138 municipal courts to 43 basic courts[96]? How did they calculate the required number of courts and did they consider the usual parameters in the calculation, such as: population, population density, upward or downward trend in the number of court procedures, the structure of the court cases etc.? Did they consider in the process the effect that the reduction of the number of first instance courts would have on one of the fundamental civil rights - the right of access to court (the right of access to court is one of the key notions of Article 6 of the European Convention on Human Rights and Fundamental Freedoms prescribing the right to a fair trial)? These questions have been left unanswered.

The role of the High Judicial Council in the reappointment procedure

The High Judicial Council is a body which, based on its competences, was in charge of the organization of the general reappointment of judges, as well as the reevaluation process of judges on which the reappointment was grounded. Namely, in 2009, before the onset of the general reappointment, the HJC adopted the **Decision establishing the criteria and standards of the evaluation of the proficiency, competence, and integrity in the reappointment of judges and court presidents**[97]. In this process, however, the proposals of the Venice Commission, set out in ***Opinion No. 528/2009,*** were not implemented as the Decision neither allowed for judges whose qualities (proficiency) were contested to defend their qualifications/competences nor gave judges who were not reappointed a grounded decision that could be contested before the court.[98]

According to the **European Commission Progress Report for Serbia of October 14, 2009**, the appointment procedure for members of the High Judicial Council, including members represented by judges in the first (interim) composition of the Council, had a series of shortcomings, did not secure adequate judicial participation in the Council, and allowed for political influence.

The procedure for the general reappointment of judges

The call for the general reappointment was announced by the High Judicial Council on July 15, 2009, and candidates were to apply within 15 days. **There were 2 483 open positions for judges in the courts of general and specialized competence, 5 030 applications were filed over half of which were filed by sitting judges. Out of them only 1 531 judges were reappointed.** More specifically, one third of the sitting judges were not reappointed and the total number of judges was reduced by one quarter.

The judges that were not reappointed, and thus removed, were not informed about this decision. Namely, they learned that they had been removed when they saw their name missing from the list of "appointed" judges. This decision, which was adopted on December

95 UNJR Report concerning the election of judges in Serbia, 17 December 2009, p. 1.
96 Judicial institutions in Serbia, OSCE report, 2011 November, p. 1.
97 ODLUKA O UTVRĐIVANJU KRITERIJUMA I MERILA ZA OCENU STRUČNOSTI, OSPOSOBLJENOSTI I DOSTOJNOSTI ZA IZBOR SUDIJA I PREDSEDNIKA SUDOVA ("Sl. glasnik RS", br. 49/2009)
98 CDL-AD(2009)023 Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia (Adopted by the Venice Commission at its 79th Plenary Session, Venice, 12-13 June 2009).

16, 2009, did not provide reasoning for not renewing the mandate of the candidates who were missing from the list.[99] Soon after this, on December 25, 2009, the Council adopted a **collective decision with a general reasoning for the judges who were not reappointed.** According to this decision, the mandate of the judges who were not reappointed was to end on December 31, 2009.[100] Moreover, they were entitled to compensation in the amount determined by the acting president of the competent court.[101]

Pursuant to Article 148, paragraph 2 and Article 155 of the Constitution, the judges were to appeal the decision of the HJC before the Constitutional Court. The lodged appeal did not include the right to lodge a Constitutional appeal.[102]

Appellate procedure before the Constitutional Court

The Constitutional Court was burdened with legal remedies used by the judges who were not reappointed and contested the decision which seemed arbitrary. Nearly all judges who were not reappointed took their cases to the Constitutional Court, which allowed this. Although these cases were given priority, in one year, only two cases were dealt with.[103]

The Constitutional Court requested from the Council to state whether the judges who were not reappointed were provided with individual decisions on the termination of their office listing in detail the specific reasons for said decisions. The HJC filed a report to the Constitutional Court explaining that the judges who were not reappointed were presented with identical decisions terminating their office as it had found making individual decisions with individual reasoning unnecessary. This argument was not acceptable for the Constitutional Court and it ordered the HJC to submit separate reasoning to the appellants stating the reasons for not reappointing them and for terminating their office. As the HJC had not met its deadline, the Constitutional Court made its decision in May.

The decision made by the Constitutional Court was not adequate to resolve the contested situation. It annulled the collective dismissal decision of December 25, 2009, that is, the contested provisions that did not observe the guarantees for a fair trial, and gave the HJC 30 days to reexamine the compliance of its decision with said guarantees.

This solution was not in compliance with the principle of "appeal to an independent court". Namely, the Constitutional Court accepted the right to appeal, which could be taken as a new practice in terms of procedure and substance. Such approach could be part of the competence concept of the Constitutional Court, although it is not as unusual for constitutional courts. Still, it is inconceivable to be asked, as a response to your appeal, to file a request to a body that had in fact violated all fundamental principles, including the right to a fair trial, to reinitiate proceedings and observe all principles in its course and expect new results.[104]

---

99 Високи савет судства на седници одржаној дана 16.12.2009. године, донео је: ОДЛУКУ о избору судија на сталну функцију у судовима опште и посебне надлежности. https://vss.sud.rs/sites/default/files/attachments/odluka-o-izboru-sudija-na-stalnu-funkciju-16-12-2009.pdf

100 Constitution of the Republic of Serbia, Article 146, Permanent tenure of judges. A judge shall have a permanent tenure. Newly elected judges shall be elected for a three-year term in office.

101 Високи савет судства, на седници одржаној дана 25. децембра 2009. године, донео је: ОДЛУКУ, Судијама које нису изабране у складу са Законом о судијама („Службени гласник РС", број 116/08) престаје судијска дужност са 31. децембром 2009.

102 Устав Републике Србије, РС бр.37, 8 новембри, 2006

103 Revizija stanja u Srpskom pravosudji, IZVESTAJ SACINILI Simon GABORJO i Hans-Ernst BOCER POČASNE SUDIJE, 2012 Beograd, p. 12.

104 Ibid p. 13.

Failure of the reappointment procedure to implement the guarantees of equitability reiterated by the Venice Commission

Serbia suffered serious criticism from all relevant European institutions for dismissing the judges, an act that, in their view, was in violation of the fundamental principles.

In this report, we are going to focus on the Opinions of the Venice Commission which in the course of the drafting of the laws voiced its criticism and concerns that this process could eventually lead to an already seen scenario.

Opinion No. 405/2006 *of March 19, 2007* of the Venice Commission.[105]

The Commission **reviewed the grounds for the reappointment** of judges, expressing "concerns that the reappointment process allows for existing judges, who had not been guilty of any wrongdoing, to not be reappointed". Yet, according to the procedure, it was presumed that existing judges met the criteria from the draft-criteria for the reappointment of judges in their entirety. However, this assumption could be disproved.

Moreover, the Venice Commission reiterated that "such a process of reappointment is acceptable only if there are sufficient guarantees for its fairness. [...] the procedure must be based on clear and transparent criteria and only past behavior incompatible with the role of an independent judge may be a reason for not re-appointing a judge; the procedure has to be fair, carried out by an independent and impartial body and ensure a fair hearing for all concerned; there must be the possibility for an appeal to an independent court."

In ***Opinion No. 464/2007 on the draft Law on Judges and Law on Court Organization*** the Venice Commission once again reiterated that "the need for a reappointment of all judges is not at all clear and the provisions from said draft law on judges does not provide for procedures with sufficient guarantees for its fairness". According to the Commission, the draft law simply established the procedures for the judicial reappointment. It seemed that the procedures were to be applied to sitting judges in the same way as to any other candidates and sitting judges should not be paid special consideration, especially in the application of procedures found essential by the Venice Commission. In fact, there was no procedure for "reappointment" as such (simply for general reappointment). The *Draft Law on Judges* links the problems created by the *Constitutional Law* regarding the Implementation of the Constitution.[106]

The suggestions in ***Opinion No. 528/2009***[107] with regard to the **draft criteria and standards for the reappointment of judges** were not included in the Decision establishing the criteria for the evaluation of the qualification of candidates in the judicial reappointment process adopted by the High Judicial Council. Whatever the case may be, these criteria set by the HJC, quantitative mainly and related only to the "efficiency" of the judges, created serious risks, related primarily with the arbitrariness of the evaluation.

105 CDL-AD(2007)04 Opinion on the Constitution of Serbia (Adopted by the Venice Commission at its 70th Plenary Session, Venice, 17-18 March 2007), p. 16

106 CDL-AD(2008)07 Opinion on the Draft Laws on Judges and the Organization of Courts of the Republic of Serbia (Adopted by the Venice Commission at its 74th Plenary Session, Venice, 14-15 March 2008), p. 4

107 CDL-AD(2009)023 Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia (Adopted by the Venice Commission at its 79th Plenary Session, Venice, 12-13 June 2009).

HJC judicial appointment criteria

As regards the criteria set by HJC, they originated from the presumption that the judge, who had been appointed based on the former regulations, had performed their judicial function during the general reappointment process and had applied to be reappointed as judge of the same court and in the same office, would meet the criteria and standards from this decision.

The said assumption could be dismissed only in the case of grounds for "suspicion" that the candidate had failed to demonstrate the required qualification, competence and capability to bear judicial function – the candidate fails to demonstrate the sufficient level of competence if in the past three years the number of overruled decisions is significantly higher than the average in the court where he or she works, or the required level of qualification and capability if in the past three years less number of cases were concluded than are required by the orientation norm defined by the standards for the evaluation of the minimal efficiency of judges, or if a criminal procedure had become outstanding due to an obvious mistake of the candidate. [108]

Opinion No. 528/2009 of the Venice Commission was, however, that these criteria should be approached with great caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner; however, it is reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, **any final decision would have to be made on the grounds of an actual assessment of the cases concerned and not on the basis of a simple counting of the number of cases which had been overruled.**

Moreover, distinction might be made drawn decisions made on the basis of obvious errors - which any good lawyer should have avoided - and decisions where the conclusion arrived at was perfectly arguable one which nonetheless was overturned by a higher court. [109]

Opinion of the European Commission on the reform

The reappointment procedure for all judges and prosecutors was carried out under the lead of the Ministry of Justice in the second half of 2009 and took effect as of January 2010. The overall number of judges and prosecutors was reduced by 20–25%. More than 800 judges were not reappointed, of previously around 3.000 judges (misdemeanor judges included).[110]

The Report states that major aspects of the reforms were a matter of serious concern. **"The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independent judiciary".[111] The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of**

108 ODLUKA O UTVRĐIVANJU KRITERIJUMA I MERILA ZA OCENU STRUČNOSTI, OSPOSOBLJENOSTI I DOSTOJNOSTI ZA IZBOR SUDIJA I PREDSEDNIKA SUDOVA ("Sl. glasnik RS", br. 49/2009).
109 CDL-AD(2009)023 Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia (Adopted by the Venice Commission at its 79th Plenary Session, Venice, 12-13 June 2009), p. 06.
110 EUROPEAN COMMISSION, Brussels, 9 November 2010, SEC(2010) 1330, SERBIA 2010 PROGRESS REPORT, p. 10.
111 Ibid, p. 10.

the profession and created a high risk of political influence. In addition, not all members had been appointed to either of the councils. Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, were not applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions. First-time candidates (876 judges and 88 deputy prosecutors) were appointed without conducting interviews or applying merit-based criteria. The overall number of judges and prosecutors was not calculated in a reliable way and adjusted several times after the reappointment had already been carried out. The right to appeal for non-re-appointed judges was limited to recourse to the Constitutional Court, which did not have the capacity to fully review the decisions. Out of more than 1,500 appeals, only one case has been dealt with. In this case, the Constitutional Court, for procedural reasons, annulled the initial decision.

Under the new court system, courts which were closed continued to function as court units, in which civil cases were heard. A uniform system for organizing the work of the court seats and the new court units had not been established.

The Constitutional court was facing a backlog of some 7,000 pending cases, including the appeals filed by judges and prosecutors who had not been reappointed.

The 2010 report found that Serbia's judicial system only partially met its priorities. "**There are serious concerns over the way recent reforms were implemented, in particular the reappointment of judges and prosecutors.**"

Review of the judicial reappointment procedure

While the Constitutional Court was dealing with the appellate procedures, the European institutions, which were invited to participate in the developments by the Serbian and international associations of judges, asked the Serbian authorities to review the procedures for the dismissal and appointment of judges due to the serious shortcomings with regard to the fundamental principles of the legal state.

The noted shortcomings have led to the amending of the *Law on Judges*. The HJC in its permanent composition was to review the decisions for non-re-appointment. Based on this, **a procedure had been prescribed – a complaint (a particular review) against the decision for non-re-appointment, i.e. all appeals lodged with the Constitutional Court were to be dealt with as complaints.** In this way the procedures were considered complete and submitted to the HJC to be dealt with as complaints. This possibility was made available to the judges who had to appeal a decision with the Constitutional Court also.

This "review" inter alia was to be carried out for all judges with both three-year mandates and tenures. Finally, the decisions made by the HJC were to be appealed before the Constitutional Court within 30 days from the submitting date.[112]

Review procedure and shortcomings

The "review" procedure commenced on June 15, 2011; however, despite the fact that it was to be completed by September, it was extended until the end of May of 2012. The process was carried out in a very difficult way and was by no means lacking shortcomings.

112 Revizija stanja u Srpskom pravosudji, IZVESTAJ SACINILI Simon GABORJO i Hans-Ernst BOCER POČASNE SUDIJE, 2012 Beograd, p. 17.

Shortcomings in the procedure concept

Opinion No. 606/2010 of the Venice Commission on the review procedure was that "prequalification and subsequent exclusion of procedures already pending before the Constitutional Court **raised serious doubts about the separation of powers.** The legislator should refrain from intervening into already commenced judicial proceedings and it will up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court".[113]

Guarantee for fair proceedings

The guarantee that the members of the first composition of the HJC, who would become permanent members of the HJC, were not to take part in the review of their own decisions made in the election procedure, was very welcomed and in compliance with European standards. Since the "review" procedure was to be carried out only by newly elected members of the HJC, this measure was to help avoid a conflict of interest and increase the fairness. Still, the question one cannot ignore and which brings forth concerns about the fairness of the procedure is the one addressing the **procedure for election of members of the Council.** Namely, the HJC has 11 members consisting of the President of the High Court of Cassation, the Minister of Justice and the President of the authorized committee of the National Assembly, as *ex officio* members, and eight electoral members elected by the National Assembly in compliance with the law. Of these electoral members six are judges holding the position of permanent judge and two are eminent lawyers with minimum 15 years of professional experience, of which one is a solicitor and the other a professor at a faculty of law. This election procedure leaves room for political influence into this procedure as well.

The practice in the decision-making

The review included reading statistical data before the Council about the norm of the judge, and hearings with judges were sometimes scheduled as late as 2 a.m. The norm was the primary reference, and very few judges were not reappointed due to being "inadequate" (corollary of the shortcomings in the performance of the judges).

Because of its way of work, this review body was seriously **lacking compliance with the fundamental principles of a fair trial:** *Transferring the burden of proof* (it was assumed in the reappointment process that judges who had already been appointed, in accordance with the law, met the criteria to be reappointed), *violation of the principle of contradiction, equality of arms, public debate, impartiality...* [114]

The Dragana Boljevic Case – the questionable quorum of HJC

Regarding the decision-making process adopted by the HJC, there is contradiction between two provisions of the law (the Council shall convene if at least six members are present at the session - Article 14, paragraph 3 of the *Law on the High Judicial Council* and the decisions of the Council shall be passed by majority vote of all members – Article

113 CDL-AD(2011)15 Interim Opinion on the Draft Decisions of the High Judicial Council and State Prosecutorial Council on the Implementation of the Laws and Law Amendments on Judges and Public Prosecutors of Serbia (Adopted by the Venice Commission at its 87th Plenary Session, Venice, 17-18 June 2008), p. 04-05.

114 Revizija stanja u Srpskom pravosudji, Simon GABORJO i Hans-Ernst BOCER POČASNE SUDIJE, 2012 Beograd, p. 17.

17, paragraph 1 of the *Law on HJC*), meaning that in order to make a decision, at least six members of the HJC were to be present at the vote. However, in the Boljevic case, one member had been dismissed, while two other members had been unable to vote (due to resignation and custody); Moreover, three of the *ex officio* members and the representative of the solicitors had been unable to participate in the vote as they had been part of the HJC composition that had made the decisions in December of 2009. Thus, the decision was adopted either by the members who were the majority simply by count and who were not objective, in compliance with the jurisprudence of the European Court of Human Rights, or the fate of Dragana Boljevic was decided by only 4 members – which was not enough to make a quorum. [115]

Results from the procedure

The outcome of the review procedure was as follows:

Overall 141 (17%) judges (reappointed) out of the 837 who were dismissed in December 2009, have demonstrated that in December 2009 their office was terminated without grounds, out of which 32 were reappointed on July 21, 2010 within the additional call, and 109 were successful in the review process (11 cases in which reappointed judges had already retired).

The Supreme Court dismissed the appeal of Dragana Boljevic, President of the Judges' Association, on the final day of the review.

Acting in the capacity of a tribunal, the HJC worked in overall composition only on the first of its 40 sessions and it has adopted only 11% (86) of its decisions in overall composition.

It recorded a drastic downward trend in the positive decisions from 42% at its first session (36 out of 86 dealt with) to 25% in the period before the termination of the review and to 6% in the final three months. [116]

The failure of the review in the Report of the Consultative Council of European Judges - CCJE

This Report is a response to the appeals submitted to this body for infringement of the standards of judicial status. Namely, this Report states the following views regarding the principles of the functioning of the judiciary and their implementation:

> - The judiciary represents one of the pillars of the rule of law and democracy. In view of its importance for all citizens, justice cannot be subjected, in whatever country, to constant changes, in particular where these are the result of undue pressure and are aimed at subjecting judicial institutions to the executive, rather than the result of a concern for improving the efficiency and quality of justice.
>
> - Independence of courts and, consequently, independence of individual judges stems from Article 6 of the ECHR; it does not represent an abstract legal notion, and should be enshrined not only in legislation but also applied in practice.

Applying these principles in light of the influence on the status, independence and security of tenure for judges;

115 Ibid, p. 20.
116 Ibid, p. 21.

- A corollary of independence is security of tenure for judges and their appointment until the statutory age of retirement. This implies that a judge's tenure cannot be terminated other than for health reasons or as a result of disciplinary proceedings – CCJE Opinion No. 1.

- The election of judges, although it is not a widespread practice in Europe, must, in the states that have opted for this method of appointment, be resorted to with caution and without jeopardizing the principle of independence.

- Using the mechanism of re-election to remove a judge from office is against these principles.[117]

The urgency for a new reform

In May 2017, Serbia commenced the drafting of new constitutional amending in order to be able to close negotiations with EU regarding Chapter 23, i.e. Judiciary and Fundamental Rights. These refer mostly to the judicial independence and impartiality with regard to the executive and legislative power.

The objective of the reform is changing the procedure for the appointment of judges and public prosecutors. According to it, judges and prosecutors will no longer be elected by the Assembly of Serbia, rather by the High Judicial Council – HJC and the High Prosecutorial Council – HPC, with the exception of the Supreme Public Prosecutor who will be elected by the Assembly for a five-year term in office at the proposal of the High Prosecutorial Council.

Eliminating political influence from the election of judges and prosecutors is the essence of the constitutional amending that Serbia is to implement in order to comply with the standards of the European Union for judicial independence. But, will the proposed solutions actually guarantee it?

According to the proposed draft amending to the Constitution of 2006, the Serbian parliament will keep the control over the election of the members of both HJC and HPC, which come from the group of legal experts. The representatives of the executive power will no longer be members in these bodies, except for the minister of justice who will become member of the State Prosecutorial Council, which will be transformed into High Prosecutorial Council. Judges and all court presidents will be appointed and dismisses by the High Judicial Council, which will have 10 members (5 judges and 5 prominent lawyers), while the chair of this body will be elected by the non-judicial members. According to one of the changes, basic court judges will be elected only from the lines of the judicial academy and newly elected judges will no longer be given a three-year probation period. [118]

All of the above leads us to believe that the legislator is still willing to influence the judicial branch through the election of HJC members. The amending also prescribes that HJC would be a body of only five judges and five prominent lawyers. According to the proposed constitutional solution, the chair of the body will be someone who is not a judge. Moreover, what happens in the case of a tie? In this case, the chair would be the one to make the final decision, and the chair cannot be anyone from the ranks of the judges, which judges a minority in this composition.

117 Situation report on the judiciary and judges in the different member states, Consultative Council of European Judges (CCJE), 18 January 2012.
118 НАЦРТ АМАНДМАНА НА УСТАВ РЕПУБЛИКЕ СРБИЈЕ, амандмани бр. VI, XII, XIII, XV, XVI, XXV, XXVI, XXVII, XXVIII itn.

The Opinion of the European Commission on the judicial independence according to the proposed reform

The current constitutional and legislative framework, **according to the Opinion of the European Commission in the Progress report for Serbia of April 17, 2018,**[119] still leaves room for undue political influence over the judiciary. Little progress had been made in establishing a fully objective, transparent and merit-based system for the appointment of judges and prosecutors. Any future constitutional or legislative changes in this regard should be designed and implemented on the basis of European standards, and the current two-track system of access to the judicial professions should be gradually streamlined. In addition, the broad discretionary powers of court presidents and heads of prosecution offices over the work of individual judges and deputy prosecutors, respectively could affect their independence and impartiality.

The constitutional reform process on judicial independence was launched in May 2017 with a call for submission of amendments to the Constitution by civil society organizations. The subsequent organization of a number of roundtables was envisaged as the first phase of a consultative process. A number of professional associations and civil society organizations left this process, citing the lack of an official government-sponsored draft constitutional text; they contested the arrangements for and legitimacy of the consultations. A new draft of amendments to the Constitution in the domain of the judiciary was published in January 2018 and was put forward for public discussion. A number of stakeholders withdrew from the consultative process criticizing its format and atmosphere, and claiming a lack of genuine debate. They sent an open letter to parliament, government and the Ministry of Justice highlighting their concerns. The European Commission recommended to the Serbian authorities and stakeholders to enter into a broad, inclusive and meaningful public debate conducted in a constructive manner. This should raise awareness regarding the constitutional reform process in the country and its outcome would be reflected in the draft that would to be sent to the Venice Commission for consideration.

Other planned interim measures to improve the institutional independence of the Councils were planned. These included the transfer of authority, from the Ministry of Justice to the Councils, over the entire judicial budget and the judicial administration, supervision of the courts, the collection of statistical data, and the adoption of the rules of procedure. Still, no progress was made in amending the Law on Public Prosecution in this regard.

According to the Report, pressure on the judiciary (including from authorities within the judiciary) remained high. Public comments by government officials, some at the highest level, on investigations and ongoing court proceedings have continued and are perceived as pressure on judicial independence. Some progress was made in this respect: the High Judicial Council amended its procedural rules to react more efficiently in cases of alleged political interference in the judiciary upon requests filed by the judges. The amended rules do not foresee a mechanism for a regular HJC reaction. The procedure has only been used in a very limited number of cases. [120]

119 EUROPEAN COMMISSION, 17 April 2018, SERBIA PROGRESS REPORT, p. 15.
120 EUROPEAN COMMISSION, 17 April 2018, SERBIA PROGRESS REPORT, p. 15.

Main findings

With a complex, long and compromising process, in December of 2009, the High Judicial Council dismissed 837 judges from office which is, statistically, some one third of all judges in Serbia.

The ground for the collective dismissal was the implementation of a general reappointment of judges, including both already appointed judges and new candidates, and reduction in the number of judges.

This judicial removal was carried out under the excuse that the European Union had requested a general judicial reform for the purposes of the candidate status of the Republic of Serbia for EU accession.

As most of the European institutions (European Union, Council of Europe, Venice Commission, Consultative Council of European Judges) have stated, the reappointment procedure did not observe any of the fundamental principles of the European Convention on Human Rights (dismissed judges were not heard, facts for dismissal were not pronounced, reasoning behind the decisions was not offered, the procedure was nontransparent in its entirety etc.)

Failure of the review

Regarding the judicial dismissal, a "review" procedure was implemented due to pressure from the European institutions. The procedure was initiated in June of 2011 and lasted until late May of 2012.

It showed that those in charge of the process, i.e. those who actually carried out the "review" had violated seriously all fundamental principles of the adequate process: burden of proof (it was believed that judges who performed their judicial functions during the general reappointment process, pursuant to the law, met the criteria to be reappointed), violation of the principles of contradiction, equality of arms, public debate, impartiality etc.

This "review" procedure was in violation of the rights of the dismissed judges and it did not comply with the fundamental principles; moreover, the discretionary procedures with which a large number of judges, who were already appointed in 2009, were dismissed were overturned only in a very limited number of cases.

IV. THE SYSTEM FOR JUDICIAL REMOVAL AND DISCIPLINARY SANCTIONS IN MACEDONIA

Genesis of judicial reappointment and evaluation

The judicial system in the Republic of Macedonia is relatively young in the context of judicial power. Yet, despite its relatively short history of development, with a span of a little over seventy years, Macedonia's judicial system has already "endured" two different societal systems and it has, in principle, carried out three reappointments of judges. The first one was the "revolutionary" one in 1944; the second was the "evolutionary" and partial reappointment, which lasted for two decades; and the third was the general "reformative" reappointment of judges in the Republic of Macedonia in 1996.

The judicial system was established for the first time on the territory of the Republic of Macedonia when Macedonia was one of the republics of the Socialist Federal Republic of Yugoslavia. The judicial bodies were first established with the adoption of the Decision of the Second Plenary Session of the Anti-Fascist Assembly for the National Liberation of Macedonia (ASNOM) on August 2, 1944 for the formation of judicial bodies and committee of judiciary, as well as judicial departments within the national liberation boards and introduction of judicial duties within their regular duties. In order to make this Decision operational, on March 31, 1945, the ASNOM Charter was adopted for the organization of the regular people's courts of Federal Macedonia establishing the courts in the Republic of Macedonia as following: 25 county courts, 3 district courts with seats in Skopje, Shtip, and Bitola and a Supreme Court based in Skopje.[121]

During this period, the adoption of the first judicial law – *The Law on the Regulation of the People's Courts* (*Official Gazette of Federal People's Republic of Yugoslavia No. 51/46*) in 1946[122] put in place the first legal framework regulating the election, evaluation, and dismissal of judges; that is, this Law laid down the grounds for the first reappointment of judges in Macedonia.

The 1946 Law on the Regulation of the People's Courts, based on the needs arising from the process of the construction of a new system of government, lent the urgency for the formation of a new socialist judicial system and set up a rather broad framework of general conditions that candidates for judges were to meet in order to be appointed: "*Any citizen can be appointed for judge or lay judge if by the appointment they are not deprived of any of their political or civil rights, and in the judicial appointment process special consideration shall be placed on meeting the courts' need for trained judges.*"[123] This setup of the framework allowed for judicial appointment of judges or persons who did not possess the generally accepted qualifications that are mandatory for today's judges, such as a law degree or a degree from a higher legal school and passed judicial exam, that is, state bar exam as assurance about the person's qualification to bear function in the judicial bodies and practice law, respectively, due to the fact that in the post-war period there was a serious deficit of judicial staff. Because of the legal framework and the practice

121 http://www.vsrm.mk

122 http://www.slvesnik.com.mk/Issues/9D852B02C2584FF5A8D4CFE375B78AE0.pdf&sa=D&source=hangouts&ust=1525287950697000&usg=AFQjCNHVQhDRtoUmGhxU24v_F2oDO8lHyQ

123 Article 20 of the Law on the Regulation of the People's Courts (Official Gazette of Federal People's Republic of Yugoslavia 51/46)

introduced with the application of this law, the new *Law on Courts (Official Gazette of Federal People's Republic of Yugoslavia No. 30/54)* of 1954 further regulated the list of qualifications required from candidates for the judicial function, that is, it read that "any person who meets the general criteria for state service and has acquired a *law degree*" can be appointed for judge". . .and "The person appointed for judge of a county or district court shall have a passed *judicial or bar exam*".[124] The Transitory and Final provisions of this Law actually provide for a solution for the necessary "reappointment" of sitting judges who did not meet the forgoing criteria as an instruction for the republic's people's assemblies, which appointed and dismissed the judges, on how to decide what to do with the judges who did not have a law degree or had not passed the judicial or bar exam, i.e. in Article 116, the *Law on Courts* stipulates that *"the persons bearing judicial function on the day of entry into force of this Law shall keep their office even if they do not meet the criteria of Article 46 of this Law in terms of education, required internship, and passed judicial exam.*[125] Due to the need of qualified judicial staff and of replacing the unqualified judges appointed by the *1946 Law on the Regulation of the People's Courts*, in the 1960s and 1970s a second reappointment took place or rather a "cleansing" of judges who did not meet the foregoing qualifications and who were subsequently replaced by new judges who did meet the legal criteria for appointment.

The Republic of Macedonia in the post-independence period

With the adoption of the Declaration of Sovereignty of the Socialist Republic of Macedonia on January 25, 1991 by the Assembly of the Socialist Republic of Macedonia, and with the Referendum for the proclamation of independence of the Republic of Macedonia of September 8, 1991, the Republic of Macedonia proclaimed independence through cessation from the Yugoslav federation. The cessation process was completed with the adoption of the first democratic Constitution of the Republic of Macedonia on November 18, 1991 by the Assembly of the Republic of Macedonia which in fact established the new system of governance based on the principle of separation of powers into legislative, executive, and judicial.

Namely, Article 8 of the Constitution[126] defined the core values of the constitutional order of the Republic of Macedonia, and in indents 3 and 4 it enshrined the principles of the rule of law and separation of the state powers into legislative, executive, and judicial, separating for the first time since 1944 the judicial power from the rest of the powers as an independent and autonomous power. Chapter III Part 4 of the Constitution regulated the status and organization of the courts, the status of judges, and the manner of appointment and dismissal of judges, as well as the status, organization, and structure of the Judicial Council of the Republic.[127]

Considering that the judiciary is the most "conservative" part of the state power, and subjecting it to quick and frequent structural changes is almost never advised, the Government of the Republic of Macedonia decided to draft a new *Law on Courts,* which was

124 Article 46 of the Law on Courts (Official Gazette of Federal People's Republic of Yugoslavia 30/54) http://www.slvesnik.com.mk/Issues/F7F87D238492BF4D884532AFD4CFCDFF.pdf

125 Article 116, *Law on Courts (Official Gazette of Federal People's Republic of Yugoslavia 30/54 ,) "the persons bearing judicial function on the day of entry into force of this Law shall keep their office even if they do not meet the criteria of Article 46 of this Law in terms of education, required internship, and passed judicial exam.*

126 https://www.sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

127 Ibid

subsequently enacted by the Assembly of the Republic of Macedonia in 1995[128] and entered into force in 1996. It was this systematic law precisely that completely remodeled the judicial system that had been effective for over 50 years as it abolished the existent specialized courts (the Commercial Court of Macedonia, the Misdemeanor Court of the Republic, district commercial courts in Bitola, Skopje, and Shtip and municipal misdemeanor courts[129]) and, among other things, envisaged the general reappointment of the judges of the municipal и district courts, that is, the basic and appellate courts.

Specifically, the Transitory and Final Provisions for the first time prescribed that the reappointment would be carried out for all judges of the basic (27) and appellate courts (3): "The appointment of judges in the basic and appellate courts in compliance with the provisions of this law shall take place no later than month prior to the date of entry into force of this law[130]". For the judges of the Supreme Court of the Republic of Macedonia, the Law in Article 117 envisaged that "the President of the Supreme Court of the Republic of Macedonia and the judges of the Supreme Court of the Republic of Macedonia that had been appointed according to prior regulations and have tenure shall maintain their functions as President of the Supreme Court of the Republic of Macedonia and judges of the Supreme Court of the Republic of Macedonia respectively".[131] This solution was an attempt to ensure continuity in the work of the Supreme Court of the Republic of Macedonia.

With the establishment of the new judicial system, the terms of appointment and dismissal were prescribed by the *Law on Courts*, while the procedure was set forth by the *Law on the Judicial Council of the Republic*. In compliance with the Constitution of the Republic of Macedonia, the *1995 Law on Courts*, and the *Law on the Judicial Council of the Republic*, the Assembly of the Republic of Macedonia was to appoint and dismiss judges as proposed by the Judicial Council of the Republic.[132] The appointment process commenced with the call for applications announced by the Judicial Council of the Republic and it was finalized on the 18th Plenary Session of the Republic of Macedonia on April 12, 1996[133] and the 49th Plenary Session of the Assembly of the Republic of Macedonia on June 27, 1996.[134] On the former plenary session, 16 judges of the Supreme Court of the Republic of Macedonia were elected of a list of 19 candidates, while on the latter plenary session, held on June 27, all judges of the 27 basic courts were elected, that is 475 judges of a list of 522 candidates.[135]

The appointment process was transparent, in terms of applications and proposal submittals by the Judicial Council of the Republic; however, in terms of the appointment, transparency, if we exclude the public voting, was not fully observed as no attempt was made to provoke a discussion as to the proposed candidates. The political momentum in the judicial appointment was quite obvious as it was evident that the MPs vote was prearranged. For example, a large number of MPs did not vote i.e. abstained during the vote on all the candidates who were not elected.[136] It was clear from this that there was a pre-prepared political scenario at play to not appoint certain candidates, a theory that was supported

128 *Law on Courts, Official Gazette of the Republic of Macedonia No. 36/95* of 27.07.1995
129 Article 111, the *Law on Courts, Official Gazette of the Republic of Macedonia No.* 36/95 of 27.07.1995
130 Article 112, *Law on Courts, Official Gazette of the Republic of Macedonia No.* 36/95 of 27.07.1995
131 Article 117 *Law on Courts, Official Gazette of the Republic of Macedonia No.* 36/95 of 27.07.1995
132 Article 32, *Law on Courts, Official Gazette of the Republic of Macedonia No.* 36/95 of 27.07.1995
133 https://www.sobranie.mk/WBStorage/Files/18sednica12april95.pdf
134 https://www.sobranie.mk/WBStorage/Files/49sednica1prod27juni96.pdf
135 Ibid
136 Ibid

additionally by the fact that in the voting for these candidates there was no discussion whatsoever regarding the arguments against them, despite the fact that all of them were proposed by the Judicial Council of the Republic as candidates that had met the judicial appointment criteria in full.

On these two assembly sessions, pursuant to Article 98 of the Constitution of the Republic of Macedonia, all judges were assigned to life tenure regardless of the instance of the court to which they were appointed.

The current system for judicial dismissal and disciplinary sanctions in the Republic of Macedonia

Since the 1995 reappointment had fueled suspicion that politics had interfered in the Macedonian judiciary through the legislative power in the appointment of all judges, radical changes were needed in the system of judicial appointment, evaluation, and dismissal and they were offered by the first comprehensive Judicial Reform Strategy 2004-2007.[137] The first step in this process was undertaken with the adoption of the amendments to the Constitution of the Republic of Macedonia, whereby Amendment XXVIII and Amendment XXIX defined the new status, structure, composition, and competences of the former Judicial Council of the Republic which was thereby renamed into Judicial Council of the Republic of Macedonia. Namely, the new Judicial Council, pursuant to Amendment XXVIII, was to have 15 instead of members in its composition, of which 8, the majority, were judges appointed by direct and democratic elections by judges themselves, 3 members were appointed by the Assembly of the Republic of Macedonia by a Badinter majority,[138] 2 were appointed upon proposal from the President of the Republic, and 2 *ex officio* members were the Minister of Justice and the President of the Supreme Court of the Republic of Macedonia. The Judicial Council, pursuant to Amendment XXIX, "shall appoint judges and lay-judges, decide on the termination of the judicial function, appoint and dismiss court presidents, monitor and evaluate the performance of judges; decide on the disciplinary liability of judges; decide on judicial immunity abolishment; propose two judges of the Constitutional Court of the Republic of Macedonia from the judicial ranks, and perform other duties pursuant to the Law".[139]

By defining the competences in this fashion in the adopted Constitutional amendments an attempt was made to put in place a completely autonomous and independent system of appointment, performance evaluation, and dismissal of judges outside the institutional and political pressure which had been exerted in the past, allegedly because judges were appointed by the legislative power, i.e. the Assembly of the Republic of Macedonia, even though the judicial candidates were proposed by the Judicial Council of the Republic as the expert body composed of judicial experts.

In fact, the new status and organization of the Judicial Council were to guarantee democracy within the judicial profession since the majority of its members were elected through direct and democratic elections by judges themselves with appropriate regional representation in accordance with the territorial setup of the courts.

137 2004-2007 Judicial Reform Strategy

138 The "Badinter majority" is a voting system adopted by the Assembly of the Republic of Macedonia for the election of Government officials whereby a majority of votes from the total number of MPs is needed, as well as majority from the total number of MPs from the communities that do not constitute a majority in the Republic of Macedonia.

139 Amendment XXIX to the Constitution of the Republic of Macedonia of December 7, 2005 https://www.sobranie.mk/WBStorage/Files/UstavnaRmizmeni.pdf

Amendments XXVI, XXVI, XXVII, XXVIII, and XIX were given full and detailed operationalization with the adoption of the *Law on the Judicial Council of the Republic of Macedonia*[140] and the *Law on Courts*[141] in 2006.

The system for judicial appointment and dismissal

According to the 1991 Constitution of the Republic of Macedonia and the *1995 Law on Courts*, all appointed judges were to be assigned to life tenure.[142] This novelty was to ensure security and stability in the performance of the judicial function, but it only urged for a stronger definition of the criteria for judicial appointment and dismissal. The introduction of judicial life tenure now required the establishment of a consistent system for regular evaluation of judicial performance, as well as clear conditions for removal, which had not been the case prior to the adoption of the *Law on Courts* and the *Law on the Judicial Council of the Republic of Macedonia* in 2006, even though the 1995 *Law on Court* envisaged the general judicial reappointment.

The *Law on the Judicial Council of the Republic of Macedonia* regulated in full the procedure and criteria for judicial evaluation, while the conditions for judicial removal were prescribed by the *Law on Courts;* on the other hand, the procedure was regulated by the *Law on the Judicial Council of the Republic of Macedonia*.

The *Law on Courts* envisages two types of judicial removal, that is, through termination of judicial office[143] and judicial removal[144].

Pursuant to the Law, the Judicial Council shall adopt a decision for termination of office on the following grounds: at the request of the judge; if the judge is no longer competent to perform their judicial function; the judge has reached the retirement age threshold i.e. is 64 years of age; the judge has been convicted of a criminal offense and sentenced to minimum of six months' imprisonment without a possibility of probation by a final verdict; or the judge is elected for or appointed to a different public office thereupon.[145]

In the part dedicated to judicial removal, the *Law on Courts* establishes two reasons for judicial removal as follows: firstly, due to serious disciplinary offence that makes them discreditable to exercise the judicial office prescribed by law, and secondly, due to unprofessional and neglectful exercise of the judicial office under the conditions defined by law.[146]

Pursuant to the Law, the following are considered serious disciplinary offences that make judges discreditable to exercise the judicial office prescribed by law: 1) serious violation of the public order that bring discredit to the judge and court; 2) serious violation of the rights of the parties and other participants in the procedure that bring discredit to the court and judicial function; 3) violation of the principle of nondiscrimination on any ground; and 4) failing to deliver the expected performance results for more than eight months without justification, as established by the Judicial Council of the Republic of Macedonia by comparing the number of adjudicated cases with the monthly indicative caseload quota per

140 *Law on the Judicial Council of the Republic of Macedonia* (*Official Gazette of the Republic of Macedonia No*. 60/06)
141 *Law on Courts* (*Official Gazette of the Republic of Macedonia No*. 58/06)
142 Article 98, Constitution of the Republic of Macedonia
143 Article 73 *Law on Courts* (*Official Gazette of the Republic of Macedonia No*. 58/2006)
144 Article 74 *Law on Courts* (*Official Gazette of the Republic of Macedonia No*. 58/2006)
145 Article 47 *Law on the Judicial Council of the Republic of Macedonia* (*Official Gazette of the Republic of Macedonia No*. 60/06)
146 Ibid

judge, where the quota is determined by a decision of the Judicial Council of the Republic of Macedonia.[147] Apart from the provisions envisaging the establishment of serious disciplinary offence making the judge discreditable to perform the judicial function as prescribed by law, the legislator provided for multiple scenarios with regard to the unprofessional and neglectful conduct of the judicial function under the conditions prescribed by law, in particular:

1. if during one calendar year, the Judicial Council of the Republic of Macedonia establishes inefficient and unproductive conduct of court procedure through judge's fault, if the judge, through their own fault, exceeds the legal deadlines for undertaking procedural activities, rendering, announcement or preparation of court decisions in more than five cases, or if during one calendar year, more than 20% of the total number of resolved cases are abolished or more than 30% of the total number of resolved cases are altered;

2. unconscientious, untimely or neglectful exercise of the judicial office in the conduct of the court procedure in particular cases;

3. biased conduct of the court procedure particularly with regard to the equal treatment of the parties;

4. acting upon cases contrary to the principle of trial within a reasonable time, that is, postponement of the court procedure without having a legal basis;

5. unauthorized disclosure of classified information;

6. public disclosure of information and data about court cases for which no final judgment is made;

7. intentional violation of the rules of a fair trial;

8. abuse of the position or exceeding the official powers;

9. violating the regulations or in any other way compromising the judge's independence in the process of adjudication and severely violating the rules of the Court Code thus damaging the perception of the judicial office;

10. if a decision is adopted by the European Court of Human Rights that confirms violation of the right to a fair trial in accordance with Article 6 of the European Convention on Human Rights or a decision is adopted by the Supreme Court of the Republic of Macedonia that confirms violation of the right to a trial within a reasonable time, as a result of the judge's action.[148]

The broad setup of the legal framework of the terms for judicial removal gives considerable discretion to the members of the Judicial Council of the Republic of Macedonia in the initiation of removal proceedings for judges of any court. The Judicial Council of the Republic of Macedonia, taking advantage of this long list of conditions for judicial removal through termination of the judicial function and removal due to severe disciplinary offense and unprofessional and neglectful exercise of the judicial function, removed some 80 judges over a period of 5 years (2010-2014).[149] This judicial removal policy was closely monitored and often criticized by the European Commission which, on several occasions, specifically in the period between 2010 and 2016, in its Progress Reports for the EU accession of the Republic of Macedonia, reiterated its views that this was a negative policy

147 Article 76, *Law on Courts* (*Official Gazette of the Republic of Macedonia No*. 58/2006)
148 Article 75 *Law on Courts* (*Official Gazette of the Republic of Macedonia No*. 58/2006)
149 Preparation of the EU Pogramme for the Support of the Judiciary, July 2014

that only delivered another blow to the judiciary. Namely, the European Commission in the 2010 Progress Report, in Chapter 23 *inter alia* states that "Yet, the role of the Justice Minister within the Judicial Council and the Council of Public Prosecutors raises serious concerns about the interference of the executive power and political control in the work of the Judiciary. *Controversial dismissals and undue interference by the Justice Minister indicate that the current system is not in compliance with European standards.*[150]" In its 2011 Progress Report, the European Commission states that "*further efforts are necessary in order to safeguard the security of tenure of judges, including the need for clearly defined and predictable legislation outlining less extensive and more precise grounds for dismissal and a better balance between disciplinary and dismissal proceedings*." [151]" This Report also reiterates that in 2010 dismissal proceedings were initiated against 13 judges resulting in 7 dismissal decisions, which is a continuation of the 2009 trend of dismissals when 10 judges were dismissed. With regard to the disciplinary proceedings, the Report states that no disciplinary proceedings were initiated in 2010/2011, while in 2009, only two disciplinary proceedings were initiated against judges.[152] Despite the fact that with the *Law Amending the Law on the Judicial Council of the Republic of Macedonia* (*Official Gazette of the Republic of Macedonia No. 100/2011 of July 25, 2011*) the position of the Minister of Justice was minimized, that is, the Minister remained in the Council but as a non-voting member,[153] still the high rate of dismissals persisted despite the minimal rate of disciplinary proceedings carried out by the Judicial Council. This is further supported by the fact that 9 additional judges were dismissed in 2011, and 3 judges in each of 2012, 2013, and 2014.[154] In the following period, that is, 2015-2016, two judicial dismissal proceedings were initiated, where one was dismissed, and the other resulted in judicial dismissal.[155]

In the meantime, due to the constant criticism expressed in the Progress Reports of the European Commission for the Republic of Macedonia and the GRECO Recommendations on the judiciary, which were mainly focused on the system for establishing the liability of the judge and conduct of procedure, a new *Law on the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges* was drafted and adopted. This Law provided full harmonization with the foregoing recommendations from the Reports of the European Union and implementation of the GRECO Recommendations made in the Evaluation Report for the Republic of Macedonia – Fourth evaluation round (2015).[156]

Specifically, with the adoption of the Law, a new body was created in the judiciary, composed of 9 members, who were appointed from among the ranks of retired judges, public prosecutors, attorneys, and law professors from Macedonian faculties of law[157]. This Law

150 2010 Progress Report on the Republic of Macedonia
151 2011 Progress Report on the Republic of Macedonia
152 Ibid
153 Article 1, ***Law Amending the Law on the Judicial Council of the Republic of Macedonia*** of 25.07.2011(***Official Gazette of the Republic of Macedonia No***. 100/2011)
154 2014 Annual Report of the Judicial Council of the Republic Macedonia http://www.vsrm.mk/wps/wcm/connect/ssrm/d9c7dde4-de73-4df8-b606-6bbd4c9f1ebd/IZVESTAJ+ZA+RABOTATA+NA+SSRM+2014.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE.Z18_L8CC1J41L0B520APQFKICD0CR4-d9c7dde4-de73-4df8-b606-6bbd4c9f1ebd-kZvrQCW
155 2016 Annual Report of the Judicial Council of the Republic Macedonia http://www.vsrm.mk/wps/wcm/connect/ssrm/64671434-2331-4bc3-8fba-f58f15f89cdc/IZVESTAJ+ZA+RABOTATA+NA+SSRM+2016.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE.Z18_L8CC1J41L0B520APQFKICD0CR4-64671434-2331-4bc3-8fba-f58f15f89cdc-kZvrQCW
156 Introduction to Draft Law on the Council for Establishment of Facts and Initiation of Proceedings for Determining Accountability for Judges, in summary procedure.
http://sobranie.mk/materialdetails.nspx?materialId=53a9ad6b-a71e-4acf-89e4-82e33bbea0c7
157 Article 6, ***Law on the Council for Establishment of Facts and Initiation of Proceedings for Determining Accountability for Judges*** (***Official Gazette of the Republic of Macedonia, No***. 20 of 12.02.2015)

resulted from the constant criticism and recommendations addressed to the Republic of Macedonia for the high rate of judicial dismissals and to the persons who participated in the process of initiating and conducting proceedings for judicial dismissal and in the adoption of the decisions for judicial dismissal, specifically because of the fact that the same body, that is, the Judicial Council, initiated the proceedings, conducted "an investigation" and adopted the decision for the judicial dismissal. This Law in fact introduced a preliminary inquiry in the procedure, which referred to the examination of the grounds for the judicial dismissal upon the submitted initiative, over which the Judicial Council had been competent. Namely, the new Council for Establishment of Facts was to be the primary filter composed of experienced former representatives of the judicial bodies, who were supposed to be immune to influences and who, due to their experience, were to introduce better guarantees to the protection of the judicial professions.

This Law was subjected to evaluation by the Venice Commission, which, in Opinion No. 825/2015 of December 4, 2015 on the Law on the Disciplinary Liability and Evaluation of Judges, in one of its conclusions, addresses the Council for Establishment of Facts (also known as Council for Determination of the Facts) stating that the functions of the Council for Establishment of Facts should be transferred back to the Judicial Council provided that members or bodies of the Judicial Council who are involved at the initial stage of the disciplinary proceedings as "accusers" or "investigators" did not participate in the final adjudication as "judges"; if the Macedonian authorities insisted on maintaining this new body, a substantial part of its members should be elected by the Parliament with a qualified majority of votes, and the procedure before this Council should be simplified. [158]

In 2015 and early 2016, the Strasbourg European Court of Human Rights, acting upon applications of 6 judges claiming illegal dismissal reached four judgments[159] establishing violation of the provisions of the European Convention on Human Rights in Article 6 – right to a fair trial – in the proceedings for the dismissal of all 6 judges.

In all 6 cases violation of Article 6 of the European Convention on Human Rights, that is, right to a fair trial, was established. This was due to the fact that in all cases the primary finding of the European Court on Human Rights was in relation to the participation of the President of the Supreme Court in the initiation of the dismissal proceedings and the voting procedure for the judicial dismissal: "In such circumstances, the Court considers that the system in which judge J.V., as member of the SJC who had sought the impugned proceedings subsequently took part in the decision to remove the applicant from office, casts objective doubt on his impartiality when deciding on the merits of the applicant's case."[160] In the other two cases, Jakshovski and Trifunovski v. the Republic of Macedonia, the European Court found that "In such circumstances, the Court considers that the system in which the complainants, as members of the SJC who had carried out the preliminary

158 OPINION ON THE LAWS ON THE DISCIPLINARY LIABILITY AND EVALUATION OF JUDGES OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA" Adopted by the Venice Commission at its 105th Plenary Session (Venice, 18-19 December 2015) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)042-e

159 Gerovska Popchevska v. The Republic of Macedonia (application no. 48783-07) http://www.pravda.gov.mk/documents/Gerovska-PopcevskavMacedonia-presuda.pdf

Jakshovski and Trifunovski v. The Republic of Macedonia (application no. 56381/09 and 58738/09) http://www.pravda.gov.mk/documents/JaksovskiTrifunovski.pdf

Popovski and Duma v. The Republic of Macedonia (application no. 69916/10 and 36531/11) http://www.pravda.gov.mk/documents/Poposki%20and%20Duma%20v%20%20Republic%20of%20%20Macedonia-presuda.pdf

Mitrinovski v. The Republic of Macedonia (application no. 6899/12) http://www.pravda.gov.mk/documents/Mitrinovski%20protiv%20RM%20mak.pdf

160 Mitrinovski v. The Republic of Macedonia(application no. 6899/12), paragraph 45. http://www.pravda.gov.mk/documents/Mitrinovski%20protiv%20RM%20mak.pdf

inquiries and sought the impugned proceedings, subsequently took part in the decisions to remove the applicants from office, casts objective doubt on the impartiality of those

members when deciding on the merits of the applicants' cases. The Court therefore concludes that the confusion of roles of the complainants (V.V. in the case of the first applicant and R.P. in the case of the second applicant) in the impugned proceedings resulting in the dismissal of the applicants prompted objectively justified doubts as to the impartiality of the SJC. The fact that in each case the complainant was only one of fifteen members of the SJC cannot, in the circumstances, lead to any other conclusion (see *Fazlı Aslaner v. Turkey* no. 36073/04, 4 March 2014). Accordingly, there has been a violation of Article 6 paragraph 1 of the Convention on this account."[161] In the first case of judicial dismissal by the Judicial Council, Gerovska Popchevska v. the Republic of Macedonia, aside from the disputed participation of the President of the Supreme Court, the European Court also disputed the participation in the voting for judicial dismissal of the Justice Minister who had participated in the investigation of the case on which the dismissal of the judge was grounded but in the capacity of President of the Anti-Corruption Commission. Therefore, the European Court on Human Rights in paragraphs 52 and 53 of the rationale of the judgment states that "It emerges from the foregoing that Judge D.I., as President of the Supreme Court, by having participated in approving the judicial opinion by, at least, the plenary of that court, expressed a view which was unfavorable to the applicant. Therefore, his further participation in the impugned professional misconduct proceedings before the SJC was incompatible with the requirement of impartiality under Article 6 paragraph 1 of the Convention. Similar considerations apply to the participation of the then Minister of Justice in the decision of the SJC to dismiss the applicant notwithstanding that he had requested, as the then President of the State Anti-Corruption Commission, that the SJC review the civil case IV P.br.2904/01 adjudicated by her (see Mitrinovski v. the former Yugoslav Republic of Macedonia, no. 6899/12, § 45, 30 April 2015)."[162]

These judgments of the European Court on Human Rights only reiterated the steady remarks made by the European Commission in Macedonia's Progress Reports mentioned above, and prove the illegitimate judicial dismissals made from 2009 to 2014. The impartiality in the dismissal proceedings, the dismissed judges, the cases on which the dismissals rest, as well as the way in which the judges were dismissed and publicly treated by the media owned by politically active persons clearly point to the fact that the system for dismissal and disciplinary sanctions was influenced by politics and required essential reforms.

The Illegal Wiretapping Affair and the Experts' Group of Reinhard Priebe

In early 2015, the opposition exposed a major affair related to national security and corruption which seriously shook the foundations of the state as it was uncovered that the mobile communications of some 20 000 persons had been illegally intercepted.[163] As a result, the Republic of Macedonia, and especially the democratic capacity of its state bodies, was subjected to careful scrutiny. Subsequently, in its 2015 Progress Report for the Republic of Macedonia, the European Commission reiterated that "this year, the Republic of Macedonia was faced with its most severe political crisis since 2001[...]. The cri-

161 Jakshovski and Trifunovski v. The Republic of Macedonia (application no. 56381/09 и 58738/09) paragraph 44 and 45 http://www.pravda.gov.mk/documents/JaksovskiTrifunovski.pdf

162 Gerovska Popchevska v. The Republic of Macedonia (application no. 48783-07) paragraph 52 and 53 http://www.pravda.gov.mk/documents/Gerovska-PopcevskavMacedonia-presuda.pdf

163 https://fokus.mk/zaev-ja-frli-prvata-bomba-denovive-sleduvaat-novi/

sis deepened when the intercepted communication was published as it was alleged that the affair involved senior government officials and officials of the ruling party, suggesting breaches of fundamental rights, interference with judicial independence, media freedom and elections, as well as politicization and corruption."[164] The contents of the intercepted conversations were broadcasted and in them the public heard the President of the Judicial Council calling the Cabinet of the President of the Government of the Republic of Macedonia in order to inform him that the judicial election was to take place soon and which judge was going to be appointed. Moreover, there was a recording of the then Minister of Interior saying that she had had a notebook with a list of judges.

This situation in the Republic of Macedonia prompted a political crisis which was resolved with a political agreement - the Przino Agreement[165] - with the assistance and mediation of the three parliamentarians of the European Parliament. In the meantime, the European Commission prepared Urgent Reform Priorities based in most part on its previous recommendations and partially on the recommendations provided by the senior independent experts' group on the rule of law who had been invited to analyze the situation. [166]

Priebe's expert group (titled after experts' group chairman Reinhard Priebe – retired European Commission Director) was to examine the developments in the interception of communications, judiciary and prosecution services, and external oversight by independent bodies, elections and the media. On June 5, 2015 in Brussels, Priebe's group released its Reports, that is, Recommendations of the Senior Experts' Group on systematic Rule of Law relating to the communications interception revealed in spring 2015.[167] In the Report, one of the remarks in the judiciary segment was that "Many judges believe that promotion within the ranks of the judiciary is reserved for those whose decisions favor the political establishment.", and that "The perception is that, particularly in relation to promotions to higher posts, political considerations prevail, and there is evidence in the leaked telephone interceptions which supports the view that this perception is justified."[168]In the segment on dismissal and disciplinary sanctions of judges, the Experts' Group, similarly to the Progress Reports of the European Commission, underscored that "In the area of dismissal of judges and disciplinary responsibility, numerous recommendations made in recent years have still not been addressed.[169] The high rates of judges who were dismissed or resigned in recent years, in particular following controversial decisions in high profile cases, is a serious concern and has a chilling effect on morale and independence within the profession."[170]

With regard to the foregoing remarks, Priebe's Group made recommendations for overcoming the current situation in several ways. Firstly, the segment on ensuring the independence of the judiciary, Priebe's Experts' Group recommended the following: "In order

164 2015 Progress Report on the Republic of Macedonia - https://www.sobranie.mk/content/НСЕИ/PR2015_All_CK_FF_MK_16.11.2015.pdf
165 http://vistinomer.mk/shto-tochno-se-veli-vo-dogovorot-od-przhino/
166 2015 Progress Report on the Republic of Macedonia - https://www.sobranie.mk/content/НСЕИ/PR2015_All_CK_FF_MK_16.11.2015.pdf
167 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf
168 See e.g. Exhibit 12 (19 March)
169 With regard, for example, to the inadequacy of clarity and concreteness in the grounds for the disciplinary proceedings, the inadequacy of clear and predictable argumentation in the decisions rendered by the Judicial Council, inadequacy of proportionality in the chosen disciplinary measures, the removal of judges on an account that is in relation to the very content of their decisions, issues regarding the efficiency of the system for appealing decisions for removal, etc.
170 Ibid

to ensure the independence of, and in particular the absence of political influence over, prosecutorial and judicial decision-making the appointment and promotion of judges and prosecutors should be de-politicized. Appointments and promotions should be made by the Judicial Council and the Council of Public Prosecutors according to transparent, objective and strictly merit-based criteria, and using transparent procedures which should be established by law and not merely by internal rules, in accordance with the recommendations of the Venice Commission's reports on judicial appointments and the independence of the judiciary[171] as well as the specific recommendations contained in opinions specific to the Republic of Macedonia, many of which have not been implemented.[172] There should be no scope for political or party affiliation or support as criteria for selection."[173]In the segment on dismissals and disciplinary sanctions against judges, Priebe's Experts' Group recommended "Dismissals or other disciplinary penalties against judges need to rigorously respect procedures and rules laid down by law, meaning not only the letter but also the spirit of the law. The applicable procedures should be regulated in a similar manner to questions of appointment and promotion, without political interference."[174]

According to the Przino Agreement, the political parties had initially agreed to hold early parliamentary elections in April 2016; however, this date was postponed on several occasions due to political interferences. In the meantime, the European Commission, in its 2016 Progress Report for the Republic of Macedonia,[175] reiterated that institutions in the Republic of Macedonia were "captured", that is, that the Republic of Macedonia was a "captured state." This opinion only confirmed the state of play noted by both political figures and Priebe's Experts' Group.

The early parliamentary elections were held on December 11, 2016. During the political campaign, it was constantly reiterated by the then opposition that they would carry out general judicial reappointment similar to the one of 1996, following the parliamentary elections.[176]

Immediately after it was formed on May 31, 2017, the Government commenced drafting the 2 documents that were essential to the judiciary. The first document was the 3-6-9 Plan, presented by the Government on July 4, 2017, which envisaged the reform steps the new Government were to take in the period of 3-6-9 months to move forward the NATO and EU integration and process. This Plan was based on the Przino Agreement and followed the recommendations from high-level meetings with representatives of EU institutions, the guidelines from the European Commission in the Urgent Reform Priorities (2015), Recommendations of the Senior Experts' Group on systematic Rule of Law issues relating to the communication interception (2015), as well as the series of recommendations made to the Government over the past several years by the bodies of the Council of Europe (Venice Commission, GRECO), recommendations by OSCE/ODIHR, findings and recommendations from the annual European Commission Reports, including the High-

171 Venice Commission Report on Judicial Appointments (Opinion no. 403/2006 of 22 June 2007, CDL-AD (2007) 028); Venice Commission Report on the Independence of the Judicial System , Part I; The Independence of Judges (Study No. 494/2008 of 16 March 2010 , CDL-AD (2010) 004); Venice Commission Report on the European Standards as Regards the Independence of the Judicial System, Part II: The Prosecution Service (Study no. 494/2008 of 3 January 2011, CDL-AD (2010) 004);

172 See, e.g. CDL-AD (2007) 011, Opinion on the Draft Law on the Public Prosecutor's Office and Draft Law on the Council of Public Prosecutors of the Republic of Macedonia adopted by the Venice Commission on the 70th Plenary Session (Venice, 16-17 March 2007).

173 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

174 Ibid

175 2016 European Commission Progress Report on the Republic of Macedonia, https://www.sobranie.mk/content/НСЕИ/izveshtaj_na_evropskata_komisija_za_republika_makedonija_2016_godina-mk2-raboten_prevod.pdf

176 https://vecer.mk/makedonija/zaev-kje-gi-raspushti-site-sudii-kje-pravi-generalen-reizbor-po-11-dekemvri

Level Accession Dialogue, the conclusions from the ministerial dialogue on the Economic Reform Programme, the conclusions from the regular meetings of the bodies of the Stabilization and Association Agreements, the document drafted by a group of civil-society organizations entitled "Proposal for Urgent Democratic Reforms " (Blueprint), and the results from consultations with the civil society.[177] With regard to the judiciary, the Plan encompassed judicial dismissal and disciplinary sanctions, offering a list of steps to be implemented as follows: revoke the *Law on the Council for Establishment of Facts and Disciplinary Responsibility of Judges*, draft amending to the *Law on the Judicial Council* in order to transfer back the functions of the Judicial Council, form a working group to draft amending to the *Law on Courts* and the *Law on the Judicial Council* regarding the procedure for disciplinary responsibility of judges, disciplinary responsibility accounts, disciplinary measures, and judicial evaluation.

The 3-6-9 Plan also envisaged a second document of crucial importance for the judiciary i.e. the 2017-2022 Judicial Reform Strategy. In the meantime, Priebe's Experts' Group conducted another mission in the Republic of Macedonia, in order to assess the progress made in terms of the implementation of the recommendations from the initial report. On September 14, 2017, the second report of Priebe's Experts' Group was released. In this report, specifically in items 29 and 30 on the issue of the general vetting of all judges, the experts state that, "While the new authorities would be entitled and are indeed duty-bound to take action against those who are proven to have abused their position, a general vetting of all judges is not recommended as judicial misbehavior is by no means universal. This minority of politically-influenced judges should be subject to effective professional and ethical rules and, where evidence is available to prove criminal responsibility, should be made criminally liable for their misconduct. Any judges dismissed for proven misbehavior should be barred from practicing law at any level. There is a danger that some in the new government may be tempted, under the excuse of acting against wrongdoers, to replace judges who have misbehaved with others willing to act for them in a similarly unacceptable manner. Suggestions that the judiciary needs to be "cleaned" are therefore unhelpful. It is essential that the new authorities stand back, respect the separation of powers and allow the judiciary to function as an independent arm of government administering justice fairly and impartially and operating fair and effective systems of judicial self-government unencumbered by any outside interference."[178]

In November 2017, the Government of the Republic of Macedonia adopted the 2017 Judicial Reform Strategy. This Strategy is an effort to take the Republic of Macedonia back on track with the Euro-Atlantic integrations, and puts a special emphasis on the rule of law and independence of the judiciary. The Strategy, in its strategic objectives, reiterates its dedication to "Establishing objective and verifiable criteria for determining judicial and prosecutorial responsibility, pluralization of sanctions, dismissal only due to severe and continuous disciplinary offenses, clear definition of the accounts for judicial and prosecutorial dismissal, clear separation of the disciplinary proceedings from the dismissal procedure; detailed rationale and public pronouncement online of all decisions on judicial and prosecutorial appointment, promotion, and dismissal, as well as re-examining of the consistent application of the legal provisions on the appointment and dismissal of bearers of functions in the judicial sector."[179]

177 http://vlada.mk/sites/default/files/programa/2017-2020/Plan%203-6-9%20MKD.pdf
178 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf
179 http://pravda.gov.mk/documents/%CD%E0%F6%F0%F2-%D1%F2%F0%E0%F2%E5%E3%E8%BC%E0%20%E7%E0%20%F0%E5%F4%EE%F0%EC%E0%20%ED%E0%20%EF%F0%E0%E2%EE%F1%F3%E4%ED%E8%EE%F2%20%F1%E5%EA%F2%EE%F0.pdf

As a results of Plan 3-6-9 and the implementation of the Action Plan of the 2017-2022 Judicial Reform Strategy, on January 11, 2018, the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges, was abolished.[180]

On April 17, 2018 the 2018 Progress Report on the Republic of Macedonia was released. The Report was very positive as was evident from both the findings and recommendations made by the European Commission to the Republic of Macedonia. Namely, the 2018 Report first stated that "The country has fulfilled the recommendations from 2016 regarding the Special Prosecutor, reform of the discipline and dismissal system for judges and the justice reform strategy."[181] Furthermore, in the Report, the European Commission elucidated the steps implemented in compliance to the previous recommendations of both the European Commission and the Venice Commission regarding judicial dismissal and disciplinary sanctions: "The Council for Establishment of Facts was abolished in January 2018 and the *Law on the Judicial Council* was amended to restore the Judicial Council's responsibilities over discipline and dismissal of judges, in line with the 2015 Venice Commission Opinion. Following these changes, it will be essential to build up a track record of impartial decisions on breaches of integrity rules and disciplinary cases free from political considerations." On the issue of the number of dismissal procedures, the European Commission stated in its Report that "Out of 4 dismissal procedures initiated in 2017, one decision for dismissal was handed down but is not final yet, one was stopped and two are underway.[182]"Furthermore, the Report, regarding the issue of judicial dismissal, makes the following recommendations to the Republic of Macedonia: "1) adopt and implement measures included in the judicial reform strategy on appointment and promotion systems in the judiciary, and shield the judiciary from political interference; and 2) adopt and implement reforms to the Judicial Council and Council of Public Prosecutors, ensuring that they fulfil their respective roles in protecting the independence of judges and prosecutors."[183]The Center for Legal Research and Analysis in the planning and drafting of this Analysis undertook a number of activities in order to develop a discussion and debate on the urgency and manner of "cleansing" the judiciary of judges who have misbehaved. Within these activities, 4 focus groups were formed composed of judges of basic and appellate courts in the four appellate jurisdictions in cooperation with the Association of Judges, and 5 interviews were conducted with eminent lawyers, former judges of the Supreme Court and lawyers, former judges of the Supreme Court and European Court on Human Rights, as well as professors from the faculties of law in Macedonia.

The general evaluation provided by the focus groups was that the judiciary needed to be "cleansed" of judges who were not worthy of holding judicial function, but only by processing individual cases. Most judges pointed out that the judges knew which of their colleagues were politically corrupt, that is, who had abused their position in favor of certain political subjects or persons, and that all those judges had been promoted instantly. Regarding the general vetting, judges were not strongly opposed, and some of them agreed to it but only if it would be carried out according to clearly defined criteria and in a transparent manner. All judges emphasized the urgency of changing the evaluation system as the current system did not reflect reality, that is, it could not evaluate judicial performance realistically and the scores it gave were either unrealistically high or unrealistically low.

180 http://sobranie.mk/materialdetails.nspx?materialId=f5dcec1c-198c-477f-97ce-507a2133b4cb
181 http://www.sep.gov.mk/content/?id=61#.Wu4-xy-B3wc
182 http://www.sep.gov.mk/content/?id=61#.Wu4-xy-B3wc
183 Ibid

The interviews with the eminent lawyers basically confirmed the perception of the judges, which was presented in the focus groups, especially in terms of the inability to carry out general vetting in compliance with the constitutional and legal grounds for appointment, evaluation, and dismissal of judges. However, some experts believed that the judicial "cleansing" through reevaluation was a necessary step in order to repair the image of the judiciary and raise the quality of justice in the Republic of Macedonia. The retired judges we interviewed were especially adamant that the judiciary should carry out the "cleanse" itself by changing the manner of evaluation and decision-making. Experts pointed out that if specific steps were not taken to the benefit of essential justice reform, especially of the model of election, evaluation, and dismissal of judges, the 2017-2022 Judicial Reform Strategy would simply be a cover and it would not create the much needed effect. All experts agreed that the judicial appointment process should assess the personality of the candidates as well, that is, their personal integrity and reputation in the legal profession. As for the Judicial Council, experts are of divided opinion when it comes to deprofessionalizing the Council, that is, to the idea of making it mandatory for Council members to be sitting judges and participate in the work of the Council. All experts agreed that Council members should be judges of higher courts, and they strongly agreed that the Council needed more judges of the Supreme Court of the Republic of Macedonia in its composition.

On May 2, 2018, the Assembly of the Republic of Macedonia adopted the amending to the *Law on Courts*[184] and the amending to the *Law on the Judicial Council of the Republic of Macedonia* pursuant to the 2017-2022 Judicial Reform Strategy and Action Plan.[185] This amending was to introduce change in the systems for judicial evaluation and dismissal. In the rationale for the *Draft Law amending the Law on Courts*, the Ministry of Justice underlined "the primary objective of the proposed law is harmonization with the Venice Commission remarks of December 2015 on the *Laws on Disciplinary Responsibility and Evaluation of Judges*, which, in its recommendations, called for strengthening the qualitative criteria in the judicial evaluation, removal of the duality of grounds for dismissal, shortening of the unnecessarily long list of circumstances that could instigate disciplinary penalty, and unequivocal establishment of "quilt" as grounds for establishing judicial liability."[186] The rationale of the *Draft Law Amending the Law on the Judicial Council of the Republic of Macedonia* followed the same direction and read that "the *Law on the Judicial Council* of the Republic of Macedonia is further aligned with the accepted recommendations with regard to evaluating the performance of judges." With the proposed amending the qualitative criteria in the evaluation of the performance of judges and court presidents would take priority over the quantitative criteria, and the ratio between them would be 60-40%. Moreover, the amending further incorporated the recommendations of the Venice Commission made on the latest amending to the *Law on the Judicial Council of the Republic of Macedonia* with regard to the transparent work of the Council and introduced the changes envisaged by the Judicial Reform Strategy."[187]

The Law Amending the *Law on Courts*[188] *inter alia* redefines and elaborates severe disciplinary offences leading to judicial dismissal and disciplinary violations leading to judicial disciplinary penalties. Namely, Article 76 of the *Law on Courts* is amended and now it prescribes the following: (1) severe disciplinary offense that triggers initiation of the procedure for establishing judicial responsibility as grounds for dismissal shall be as follows:

184 https://www.sobranie.mk/materialdetails.nspx?materialId=c3ee6f9e-b7ec-4a69-8200-7a79bb93aa9b
185 https://www.sobranie.mk/materialdetails.nspx?materialId=c3c56866-11ea-4f51-bb63-a4bb901bd50b
186 https://www.sobranie.mk/materialdetails.nspx?materialId=c3ee6f9e-b7ec-4a69-8200-7a79bb93aa9b
187 https://www.sobranie.mk/materialdetails.nspx?materialId=c3c56866-11ea-4f51-bb63-a4bb901bd50b
188 Law Amending the Law on Courts (Official Gazette of the Republic of Macedonia No. 83/2018 of 8 May 2018)

1) membership in a political party (Article 52, paragraph (5));

2) preventing a higher court from exercising oversight on the judicial performance;

3) using the function and reputation of the court for private interests;

4) severe disruption of public order damaging the reputation of the court and their own reputation established by a final court decision;

5) receiving unsatisfactory evaluation results in two consecutive evaluations carried out by the Judicial Council of the Republic of Macedonia which is considered an unprofessional and neglectful performance of the judicial function.

6) performing other public function, work or activity that is incompatible with the exercise of the judicial office;

7) accepting gifts and other benefits for bearing the judicial function;

8) in the decision-making the judge fails to implement the views from the final judgments of the European Court on Human Rights, and

9) sharing (revealing) confidential information they have learned by adjudicating or performing the judicial function.[189]

As for disciplinary offences, the law amending lists the following:

1) breach of the rules of the code of ethics for judges damaging the perception of the judicial function;

2) severe disruption of the relations within the court which strongly affect the performance of the judicial function;

3) failure to meet mentor duties and duties regarding the vocational training of associates;

4) breach of the rules on the absence from work;

5) failure to fulfil the duty of continuous training;

6) failure to adhere to dress code, i.e. not wearing court dress, and

7) failure to schedule hearings in cases assigned to them or in other ways delaying the procedure without a justified cause or failure to process the case which in turn causes the case to become obsolete due to the statute of limitations on the criminal prosecution or on the enforcement of the criminal sanction imposed for a criminal offense."190

The *Law on Courts*, with the latest amending, provided a very broad and quire complicated list of grounds for dismissal making the work of the judges and of the Judicial Council even more difficult. One of the conditions is especially confusing, and that is that the judge "in the decision-making fails to implement the positions from the final judgments of the European Court on Human Rights" as it is very broadly defined, and it is not possible to evaluate whether all judges are capable and knowledgeable enough to follow and apply the practice of the European Court on Human Rights.

189 Ibid
190 Ibid

The *Law Amending the Law on the Judicial Council of the Republic of Macedonia*[191] introduced a series of changes. With the abolishment of the Council for Establishment of Facts, all its competences had been transferred back to the Judicial Council; however, from the aspect of the evaluation, it defined for the first time the process of judicial performance evaluation through elaborated quantitative but more importantly qualitative criteria. Pursuant to Article 21 of the *Law Amending the Law on the Judicial Council of the Republic of Macedonia* Article 103 is amended and it reads as follows: "Qualitative criteria in the evaluation of the judicial performance shall be:

- quality of the performance of the judge in terms of the number of annulled decisions due to severe breach of the proceedings in relation to the total number of resolve cases,

- quality of the performance of the judge in terms of the number of reversed decisions of the total number of rendered decisions,

- quality of court proceedings (observance of the legal deadlines for taking procedural actions, observance of the legal deadlines for adoption, pronouncement, and making of the decisions, duration of the court procedure, and observance of the principle of trial within a reasonable time),

- quality of the rendered decision , which shall be established via insight into five cases, selected at random by the automated court case management information system (ACCMIS) and five cases selected by the judge in the evaluation period, and

- imposed disciplinary measure."[192]

In fact, the said amending to the *Law on the Judicial Council of the Republic of Macedonia* is a response to the continuous requests made by judges for the qualitative criteria to take priority over the quantitative criteria, which would undoubtedly raise the quality of justice in the Republic of Macedonia.

191 Law Amending the Law on the Judicial Council of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 83/2018 of 8 May 2018)

192 https://www.sobranie.mk/materialdetails.nspx?materialId=c3c56866-11ea-4f51-bb63-a4bb901bd50b

Main findings

From the situation in the judiciary in the Republic of Macedonia it is evident that improving the status of judges and raising the level of public trust and level of positive perceptions about the judiciary as the third power would be a major challenge. That corruption is present among a certain group of judges was confirmed with the illegally intercepted communications, which show clearly that the executive power and certain judges were in synergy, which was noted also by both the European Commission and Priebe's Experts' Group.

All the reports, as well as the conversations from the illegally intercepted communications, plainly show that only a small group of judges were politically corrupted and worked in favor of certain politicians and political entities. As a result, the interviews with experts and judges in the focus group followed the direction underlined also by Priebe's Experts' Group Report of 2017, which was that investigations should be carried out in order to establish individual responsibility and where such responsibility would be established the persons responsible should be barred from practicing law.

As for the vetting process, from a chronological point of view, such process had been carried out in Macedonia only during transitions to new systems of government. The first vetting process was executed in 1944, with the establishment of the Macedonian judiciary, when the communist system of Government was introduced, while the second one was in 1995, a few years after the democratic system of government was introduced.

Today, the scenario at hand is not one of transition to a new system of government, but one of a fight against politically corrupt judges. With the current constitutional and legal status of judges, it would be impossible to carry out a general reappointment or vetting of judges in Macedonia. Even if the necessary circumstances to carry out this process were in place, it would be more important to have first an objective and transparent system of evaluation indicators harmonized with the European values and principles, on which the judicial systems of the modern democracies are built, that would be applicable to all judges. The reason for this is that whenever an operation of such large scale is carried out there is a danger of political interferences the goals of which is to install "new" judges that would serve the interests of a certain political elite or political subjects.

V. FINAL CONSIDERATIONS

>Vetting is usually focused on institutions that have been involved in abuses of human rights, which puts the **security sector and judicial institutions** first in line to be vetted.

>Vetting as a process of reform of staff and institutions should not be implemented as an isolated measure for planned judicial reforms. It needs to be supplemented and coordinated with **other measures for institutional reform** (organizational structure, legal framework etc.) in the effort to ensure a process of appointment, evaluation, and dismissal, through procedures that follow strictly determined rules, principles, and standards, clear and known in advance, which would essentially guarantee that the process is merit-based, in order to prevent potential threats from partisan or other interferences in the judiciary.

>In order to carry out the activities related to this vetting mechanism, a detail assessment of the **necessary resources** is needed, such as, individual bodies and institutions that need to be included, sufficient budget, support from donors in knowledge and funds, as well as a limited duration of the process which needs to offer certain degree of certainty (predictability) to those subjected to it. Therefore, it is necessary to determine the range of the vetting, the number of individuals encompassed by the vetting, the duration of the process: from the beginning (establishing the legal framework and implementing bodies), course of the procedure (which institutions and bodies would provide support and assistance in the process of proving background information about the persons, reports, entries, etc.), as well as steps to be taken (amending the legal framework, organizational structure, and functional analyses) which should be designed and well planned in advance.

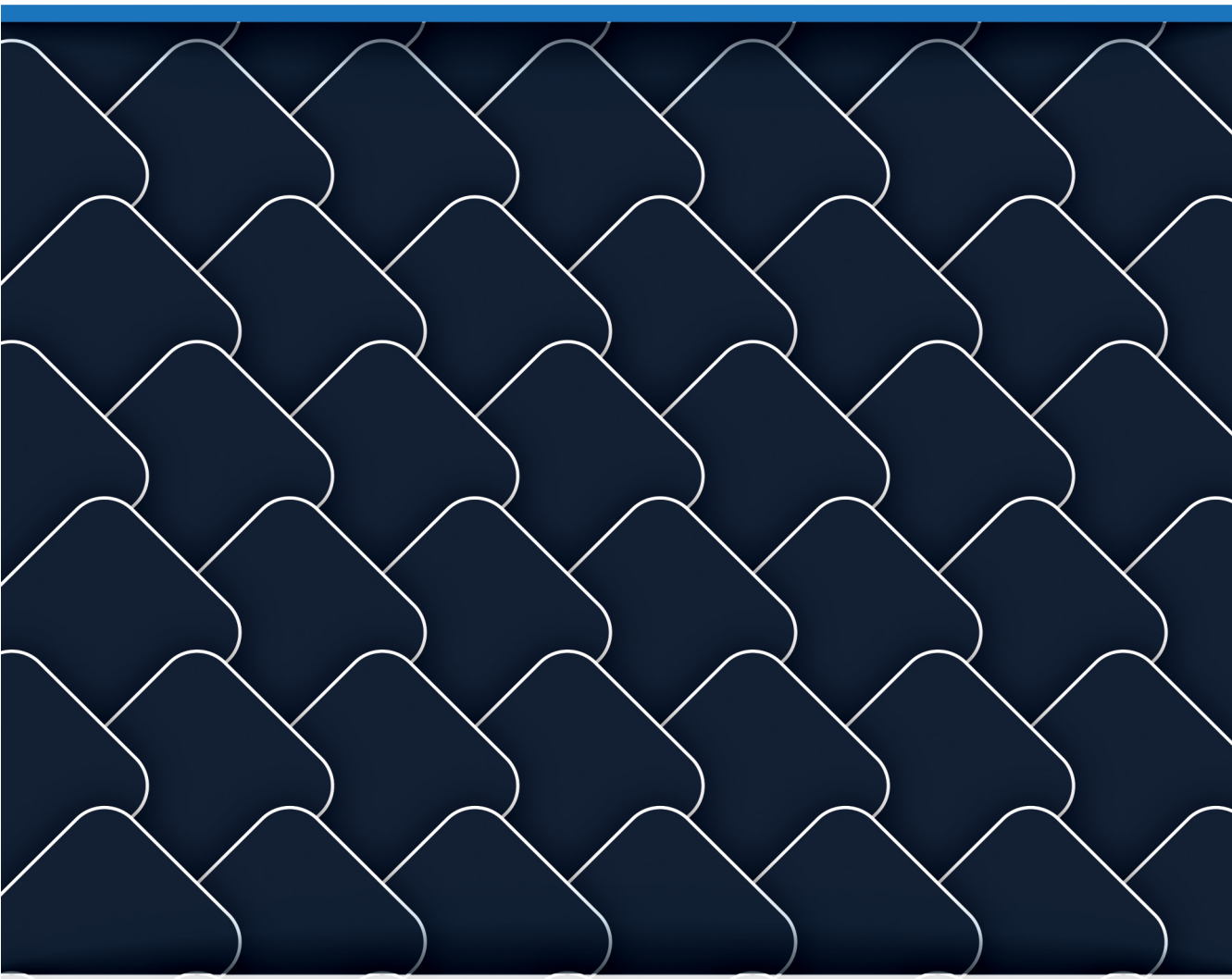
>Developing **judicial vetting criteria** that are verifiable, relevant, and determined through special procedures and that guarantee the protection of the procedural rights of the entities is essential to the successful implementation of the transitional reform. These criteria should be kept as a guide for future personnel employment through the prism of already established professional and ethical standards (moral integrity, competence, suitability, professionalism, independence, impartiality, etc.).

>Often vetting faces opposition from the parties that are directly affected by the vetting process. Therefore, it is important to encourage the progressive forces and actors from the society who have good intentions and the required potential to plan and implement these measures. In that sense, it is important to include more stakeholders in the process and to have a **broad consensus and acceptance** of the reform, instead of the perception that it is simply a mechanism for partisan retaliation. At the same time, the conditions for unimpeded functioning of the institutions during the entire vetting process must be ensured in order to preserve the stability of the system as a whole.

>A successful vetting process also requires a well-established **monitoring system** represented by the domestic and international institutions, the balance of which would depend on the context and recommendations by the relevant factors (non-

governmental sector, sectorial strategies, international community); however, the ownership over the process must unequivocally be in the hands of the domestic factor. The practice of the other countries shows that when the international factors take on a lead role in the undertaken reforms, this passivizes the institutions in terms of the implementation of innovative and sustainable reforms, even when they are willing to learn from their own mistakes made in honest attempts to introduce positive change in the system. Still, the best way to establish this partnership is by regular monitoring of the progress by the international community, as well as seeking advisory opinions from important institutions before taking certain steps that put at risk the principles of separation of powers, protection of human rights, standards and norms for good conduct etc.

>As is evident from the examples from the other countries, the vetting process could create the conditions for correcting certain aspects in terms of **equal and equitable representation** of different categories in the judiciary (ethnic, gender, age, and so on). In multiethnic societies, such as Macedonia, this could create new conditions for more equitable inclusion of all the groups in the society, provided, of course, they meet the required terms to bear the function as prescribed by law and good practices.



ЦЕНТАР ЗА ПРАВНИ ИСТРАЖУВАЊА И АНАЛИЗИ
CENTER FOR LEGAL RESEARCH AND ANALYSIS

www.cpia.mk