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VETTING OF JUDICIARY IN TRANSITIONAL COUNTRIES – SUCCESSFUL TOOL OR ENTRY POINT FOR POLITICAL INFLUENCE[2]

Abstract

The author analyzes experience in the vetting of the judiciary as a tool used to regain trust in the justice system. Special focus is put on Serbia and Albania experience. The comparative experience and practice do not show a clear link between vetting process and public trust in the judiciary. The author analyzed the importance of a common understanding of reasons for vetting process as well as preparatory activities for its implementation – Constitutional ground, selection of proper institution, including the establishment of ad hoc bodies, proper timeframe and administrative capacities to implement the whole process. In addition, communication with the public and professional community is of utmost importance to ensure support throughout vetting. The author provides an overview of the comparative practices related to the models of vetting conducted in Serbia in 2009 and ongoing vetting process in Albania. Although there are delays in implementation in Albania, it is obvious that Albania legislators learned from Serbian experience and included tools to ensure transparency of the vetting.

***Keywords**: vetting of judges and prosecutors, integrity, public trust in judiciary, corruption, vetting criteria*

1. Introduction

The judiciary is an important component of the rule of law in any country. Problems in the functioning of the judiciary could lead to insecurity and recourse to private justice. The inability of the judiciary to deal fairly among citizens contributes to a culture of impunity where citizen voices are denied.

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Several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), guarantees rule of law. The Covenant enjoins State parties to ensure equal treatment of persons before judicial tribunals and to a fair and public hearing by competent, independent and impartial tribunals established by law.[3] The United Nations Human Rights Committee has further declared that the right to be tried by an independent and impartial tribunal is an absolute right for which there should be no exception.[4] The UN Basic Principles on the Independence of the Judiciary,[5] and the UN Guidelines on the Role of Prosecutors[6] are major documents that have set out the universal standards on the role of judiciary institutions.

Integrity is essential for the proper discharge of the judicial office. In addition, the public trust is essential for the justice system. When there is a lack of public trust in the justice system and/or lack of integrity in the judiciary, countries try to resolve problems applying different judicial reforms. Reform efforts can vary from increasing competences of the judiciary (establishment of training institution and specialization of judges/ prosecutors) to the introduction of legal safeguards for independence (constitutional guarantees, amendments to legislation related to the appointment and disciplinary procedures). However, these reforms usually have not been sufficient to bring the change that is needed to transform the judiciary into the strong and independent institution.

In countries emerging from periods of armed conflict or authoritarian rule, efforts to address the legacies of massive human rights abuses have taken many different forms. Vetting public employees is one of the measures that has been used in post-authoritarian countries.[7] However, this measure is also used in some countries as a last resource to regain public trust in the justice system.

The term "vetting" is used in the article to refer to processes for assessing an individual's integrity as a means of determining his or her suitability for public employment.[8] However, little systematic attention has been paid to the topic.

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[3] Article 14(1) of the ICCPR.

[4] Communication No 263/1987, M Gonzalez del Rio v Peru (Views adopted on 28.10.1992), UN Doc CCPR/ C/46/D/263/1987 at para 5.2.

[5] Article 7(1) of the Charter.

[6] Adopted by consensus by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 later endorsed by the UN General Assembly in resolution 40/32 (29.11.1985) and welcomed by the UN General Assembly in resolution 40/146 (13.12.1985).

[7] Vetting Public Employees in Post-conflict Settings – Operational Guidelines, UNDP, Bureau for Crisis Prevention and Recovery, 2006.

[8] P. Grieff, A. Mayer-Reiff, Justice as Prevention: Vetting Public Employees in Transitional Societies, Social Science Research Council, New York, 2007, 17.

2. Comparative experience in vetting process

An important question for any vetting process is what misconduct is assessed.[9] The criteria of a vetting effort are the specific types of misconduct that vetting authorities look for in an individual's past. Each vetting process operates on the basis of certain criteria.

The determination of vetting criteria is often controversial and politically challenged.[10] In the article, we will assess vetting of the judiciary in Serbia and Albania. Albania reasoning for vetting process is clearly articulated and there is a consensus among citizens, international community and state on reasons for vetting. The situation in Serbia in 2009 was not so clear. The official reasoning for vetting process was differently justified from lustration to fight against corruption. Case studies of Serbia and Albania present experience how lack of common understanding of vetting process influence on its success. Although Albania experience is ongoing, it already has started to produce results with more than one hundred judges and prosecutors resigning from the office in order to find an escape from the re-evaluation process.[11]

2.1. Albania vetting process

Reasoning and relevance of the vetting of the judiciary in Albania are expressed in the Venice Commission Opinion CDL-AD(2016)009 as *the extraordinary measures ... necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system*.

Constitution of Albania in article 179/b describes the process of vetting as a guarantee of the proper functioning of rule of law and true independence of the judicial system. The main principles of the vetting process are fair trial and respect of the fundamental right of the assessee.

Following amendments of Constitution in 2016, Albania adopted legislation on vetting procedure in the judiciary. Law No 84/2016 on a transitional re-evaluation of judges and prosecutors in the Republic of Albania was adopted in 2016 with the aim to restore citizens trust in the judicial system and to ensure independence.

To carry out the vetting process, two special institutions have been established as *ad hoc* bodies with the special mandate of vetting and deciding on appeals. Vetting process will be under the responsibility of Independent Commission of Qualification in the first instance, meanwhile,

[9] *Ibid., 22*.

[10] In post-communist Eastern Europe, authorities often vetted for evidence of nonviolent actions that constituted violations of public trust, such as past collaboration with secret service institutions.

[11] B. Maxhuni, U. Cucchi, *An Analysis of the Vetting Process in Albania*, Group for Legal and Political Studies, Prishtina 2017, 3.

the appeals filed by the assessee or from the Public Commissioner that will represent the public interest will be examined by the Appeal Chamber, specialized chamber of the Constitutional Court. The mandate of the members of the Independent Commission of Qualification and Public Commissioner is 5 years while the mandate of the members of the Appeal Chamber is 9 years. After the dissemination of the Commission, the ongoing cases on the vetting of judges will be examined by the High Judiciary Council, according to the law, while the ongoing cases on the vetting of prosecutors will be examined by the High Prosecutorial Council. If there is evidence of corruption, the cases will be transferred to the Head of Special Prosecution on Anticorruption.

To make vetting a fair process, the Law on Vetting provides a number of requirements for members of the re-evaluation of institutions. To be eligible, the selected individual should not have been a member, collaborator nor favoured by the State Security services before 1990.

In order to ensure transparency and monitoring over the whole process, the International Monitoring Operations is set up, composed of judges and prosecutors selected by EU member states. Its duties will be an exercise in accordance with the international agreement and will include:

a) Providing recommendations to the Parliament regarding the qualifications and selections of the candidates for the position of the member of the Independent Commission of Qualification, Public Commissioner and Appeal Chamber;
b) Submitting findings or opinions for the cases that will be examined by the vetting' structures, and contribution to the vetting of integrity. According to these findings, the international observer might request from the vetting structure to examine proofs or to represent proofs ensured by the public state, foreign or private ones, in accordance with the law;
c) Addressing the Public Commissioners, recommendations to file an appeal. In case when the Public Commissioner does not implement such recommendations, it should prepare a written report reasoning the grounds for refusing it;
d) Accessing all the information, immediately, for the data of the persons and necessary documents, in order to monitor the vetting in all its stages.

In Albania, the subject of vetting will be all judges and prosecutors, including judges of the Constitutional Court, General prosecutor and all inspectors of the High Council of Judges and legal advisors in Constitutional Court, High Court, Administrative courts, General Office Prosecutors.[12]

[12] Council of Europe (2016), "Law on the transitional Re-Evaluation of Judges and Prosecutors, Albania",*http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e.*

The vetting process will be applied also to the former judges, former prosecutors and legal advisors to Constitutional Court and High Court who have worked in these positions for at least three years, upon their individual request, if they want to be returned in the Justice System.

The Vetting Law provides that the vetting is based on three main criteria[13]:

a) asset assessment - Anyone under assessment must be able to justify his/her assets based on legitimate sources (i.e. income and tax declarations). The assessee in addition to the declaration of assets shall submit all the necessary documents necessary to justify the veracity and legitimacy of his or her statements. If the declared wealth happens to be twice as big as his/her legitimate income, the assessee is considered guilty and is dismissed from the office if not able to prove the contrary.[14] Asset assessment will be conducted by High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (HIDACCI);
b) background assessment as integrity check - The background assessment consists in the verification of the assesses' declarations and other data aiming at identifying links with individuals involved in organized crime. If the assessee, upon verification, is found guilty of having clear links with figures from the organized crime, he/she is dismissed from office if he/she is not able to prove the contrary. The Albanian National Security Authority is responsible for performing background assessment of judges and prosecutors and its role is controversial in the whole process.
c) proficiency assessment as a check of professional skills - The proficiency assessment makes sure that each subject will undergo evaluation skills. In the case of judges, they will be evaluated over their judging skills, while in the case of prosecutors; they will be evaluated upon their ability to conduct an investigation.

During the procedures before the Vetting Structures, the subject enjoys the right determined in the Code of Administrative Procedure. The Commission invites the subject of vetting in a hearing session, in compliance with the Code of Administrative Procedure. The hearing session is public and is held in compliance with the law on administrative courts. At the end of the process, the Commission might decide to re-confirm the subject in his/her duty; to suspend him/her for a period of 1 year with the obligation to follow the training programs, according to the curricula approved by the School of Magistrates; and to dismiss him/her.

[13] Article 4 of the Law on Vetting.

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

The Law on Vetting also envisages institute of "justice collaborator" in article 54. The justice collaborator is any person who was involved in the corruption case with judge or prosecutor and who reports to the prosecution office case and provide evidence. The justice collaborator is exempted from prosecution. This institute opens space for reporting of corruption among judiciary without fear of prosecution for participation in the crime.

The complex structure of *ad hoc* vetting bodies and regular institutions that are obliged to assess some of the indicators should prevent political involvement in the whole process, however, it could slow down the process and minimize effects of the Law.

Public expectation of the whole process is very positive and there is a need to manage these expectations having in mind that majority of vetting processes failed to achieve expected results. Also, international community perceives the whole process as a positive example that could serve as a template for the organization of vetting process in other countries. Time will show if this optimism was justified.

Although Serbian experience and context were different, Albanian colleagues and members of ad hoc bodies and monitoring institutions could learn from it.

2.2 Serbian experience in reappointment of judges and prosecutors

In May 2006, the National Assembly adopted the first National Judicial Reform Strategy 2006-2011, which was described by many as an affirmation of faith in Serbia's future. The strategy's framework focused on improving the independence, transparency, accountability, and efficiency of the judiciary.

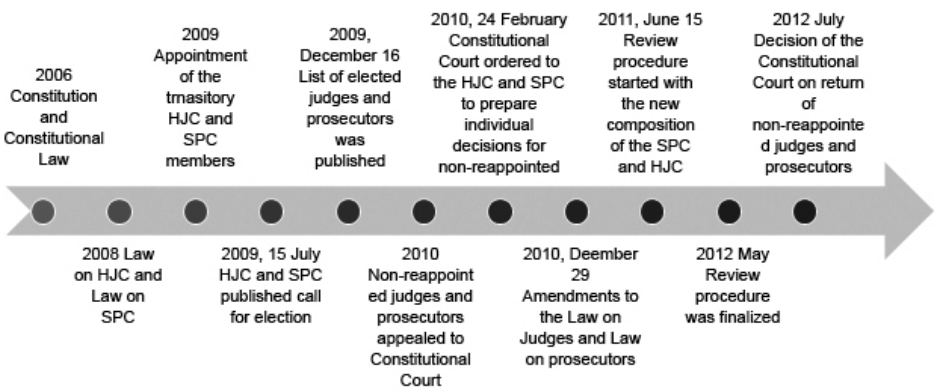
Serbia adopted new Constitution in 2006 with the intention to establish judicial independence and an autonomous public prosecutorial service.[15] The 2006 Constitution incorporated many of the strategy's recommendations, including changes to the role and powers of the High Judicial Council (HJC), and the creation of the State Prosecutorial Council (SPC).

The Constitutional Law on Implementation of Constitution envisaged reappointment of all judges and public prosecutors by the transitory composition of the High Judicial Council and State Prosecutorial Council.

[15] Opinion of the Venice Commission CDL-AD(2007)004 - "60.The chapter on courts in the draft Constitution of the Republic of Serbia approved by the Government of Serbia in 2004 was already commented upon by the Venice Commission (CDLAD(2005)023). The Constitution as adopted indeed no longer contains some provisions which were particularly criticised by the Commission, such as the election to judicial office of judges following the probationary period. On the other hand, the technical quality of the text seems poorer than in the previous draft and the overall impression of an excessive influence of parliament on the judiciary remains.
61. This impression is strengthened by the Constitutional Law on the Implementation of the Constitution which provides that all sitting judges within the Republic of Serbia have to be reappointed following the entry into force of the new Constitution. This means that the first High Judicial Council elected following the entry into force of the Constitution will be extremely powerful."

Under the reappointment procedure, the overall number of judges and prosecutors was reduced by 30 percent, and more than 800 of 3,000 sitting judges were not reappointed.[16] Around 170 prosecutors and deputy public prosecutors were not reappointed. Many judges and prosecutors who were not reappointed appealed to the Constitutional Court (1,500 such appeals were lodged).[17] The legislative amendments were adopted in December 2010 that transferred the cases back from the Constitutional Court to the Councils for further proceedings (reviewing procedure). The second round of decisions by Councils followed, and 109 judges and 29 prosecutors were reappointed. Non-reappointed judges and prosecutors filed another appeal with the Constitutional Court, which ruled that review of the reappointment decisions had not corrected the shortcomings of the reappointment process.

The Constitutional Court ruled in 2012 that the HJC and SPC had not applied objective criteria for reappointment; that judges and prosecutors had not been adequately heard during the procedure; and that Councils had not provided adequate explanations for reappointment decisions. The Constitutional Court ordered the reinstatement of all judges and prosecutors who had appealed for their non-reappointment. This 2012 Constitutional Court decision led to the reintegration of some 800 judges and 120 public prosecutors and deputies. The Councils met the 60-day deadline set by the Constitutional Court for the returning of the non-reappointed judges and prosecutors in the system.



[16] The 3,000 figure includes misdemeanor judges: until 2010, misdemeanor judges were not part of the judicial system, so the reappointment process considered whether these judges should become part of the judiciary. See, below.

[17] The Constitutional Court received around 1,500 appeals and constitutional complaints, filed by around 800 judges and prosecutors who were not elected. This represented a heavy burden for this Court (around 1,500 cases among a total of 5,500 cases in the court), which tries to find ways to handle these cases in a proper way and without excessive delays. A large majority of the non-(re-)elected judges and prosecutors filed two complaints: one against the decision not to elect them, and another one against their termination of their office. The Constitutional Court dedicated several sessions to try to find a modus operandi for handling the cases.

The Government media campaign resulted in the support of the society and international community for reappointment process. The whole procedure was presented as "lustration" of judges and prosecutors in the period following the fall of Milosevic's regime and as an aspect of the modernization of an insufficiently efficient judiciary system. It was also explained that process will ensure dismissal of judges and prosecutors that were corrupted or unworthy. The civil society was not involved in government campaign.

International community perceived as objectives of the re-appointment process "lustration" and an attempt at achieving greater efficiency of the judiciary as well as the fight against corruption within the justice system. Over the time this perception was changed. In that respect, it is interesting to mention the minutes from a meeting with the rapporteurs of the Venice Commission of February 21, 2008 (CDL-AD(2009)023). In the course of the meeting, the rapporteurs said they feared the re-appointment of existing judges could lead to a possible termination of the office of judges who committed no criminal offence.[18]

2.2.1. Main reasons for failure of the reappointment

Question of Constitutionality of the Re-appointment

The issue of the Constitutionality of the reappointment put the shadow on the procedure.[19] At the time the 2006 Constitution entered into force, all judges in Serbia were appointed for an indefinite tenure, therefore their function was permanent, and hence this function could not have been terminated if they were not re-appointed to the same court, since all courts, except for the Administrative Court, the courts of appeal and misdemeanor courts had existed before, irrespective of the title assigned to them by the Constitution. Therefore, in Article 148, paragraph 1, the Constitution includes a guarantee and barrier against possible abuse by the legislator.

The reason of changing the names of courts, the provision of article 7 of the Constitutional Act for the Implementation of the Constitution,

[18] As representatives of the Serbian state explained, the corruption issue was raised with respect to certain judges who had been appointed during the former regime. In that regard, the rapporteurs assessed the proposed reform as inadequate.

[19] 2006 Constitution declared legal continuity with previous Constitution from 1990. All judges were elected on the permanent tenure according to 1990 Constitution, so the 2006 Constitution could not terminate their function. Only possibility for termination could be dismissal. Criteria for dismissal are strict. In the re-election procedure, there were more candidates for position and less positions than there were judges in the moment of announcement of re-election. It was obvious that significant number of judges (even if they fulfill all criteria) could not be re-elected since number of positions were decreased.

in fact, envisaged the re-appointment of all judges and prosecutors in Serbia, which implies the collective termination of the capacity of a judge/prosecutors for all judges and prosecutors in Serbia.

Venice Commission in its Opinion on the Constitution of Serbia[20] concludes it is not justified to base Constitutional Law on the principle of discontinuity between the institutions functioning under the previous Constitution and those provided for in the present Constitutions since the provisions of the previous Constitution were followed during the adoption of the 2006 Constitution.[21] Venice Commission did not want to discuss motivations for the reappointment procedure and its justification.[22]

Criteria for re-election

In an Opinion of 2009,[23] the experts of the Venice Commission expressed their concern that the proposed procedure regarding the re-appointment of existing judges would leave the door open for removing judges who had not been guilty of any misconduct.

A decision on establishing the criteria and norms for assessing the competence, capacity and worthiness for the appointment of judges and court presidents[24] is the most important source of substantive law in the procedure for the appointment and re-appointment of judges (prosecutors). The Venice Commission welcomed the draft criteria and standards for the election of judges which had been submitted to an opinion, and stated that their previous concern mentioned above was partly addressed by these draft criteria. For example, the presumption – mentioned in the draft - that judges already appointed fulfil the criteria was deemed encouraging. However, the experts noted that this presumption might be overturned, and recommended that, in this respect, great caution must be applied.

Implementation of Criteria in practice was a challenge since some indicators were not put into full context and data environment was not automated.

[20] Opinion on the Constitution of Serbia, adopted at the 70th Plenary session, 17-18 March, 2007, CDL-AD(2007)004.

[21] Paragraph 70 of the Opinion.

[22] "72. By contrast, the need for a reappointment process as provided for in the Constitutional Law with respect to all judges and prosecutors is not at all obvious. It may be motivated by the wish to get rid of judges who have compromised themselves with previous regimes or who are corrupt. The Venice Commission is not in a position to evaluate whether such reasons exist with respect to a large number of judges. A comprehensive and quick reappointment process is bound to be extremely difficult and there is no guarantee that in the end better judges and prosecutors will be appointed. One may therefore have doubts whether the decision to undertake such a process was wise."

[23] CDL-AD(2009)023, *www.venice.coe.int.*

[24] Same act was adopted for prosecutors and deputy prosecutors.

According to the HJC decision delivered on July 15, 2009, criteria for re-appointment procedure were: competence, capacity and worthiness of judges and prosecutors. Capacity was understood as qualification and quality of work and was estimated based on following indicators: duration of studies, average mark, success at the Bar exam, subsequent additional education, published papers, number of overruled and reversed decisions. Competence was understood as efficiency in work and was estimated based on following indicators: number of cases solved and the relation between that number and the estimated norm. Related to the worthiness the Decision envisaged that those who are already judges/prosecutors are presumed to be worthy.

Criteria established assumption that a judge who was elected in line with previous regulations, who was in office at the moment of the election, and submitted a request to be elected to a same type of court and for the same level position, meets the criteria and norms determined by this decision. This presumption can be rejected only if there are reasons for a "doubt" (a problematic concept from the aspect of rebutting a presumption) that the candidate meets the criteria and norms identified in this decision due to his failure to demonstrate qualification, competence and worthiness needed for the performance of a judge's work. It is considered that the candidate failed to demonstrate the appropriate level of qualification if they had a certain number of annulled decisions in the last year which is higher than the average in the court in which they work. It is considered that the candidate failed to demonstrate appropriate competence if they failed to resolve a specific number of cases defined by the norms for the assessment of minimal performance efficiency in the last three years, or if the expiry of limitations of the proceedings can be attributed to an obvious mistake made by the candidate.

Methodology for estimation of capacity was challenged. It was interpreted that number of overruled and reveres decision is not sufficient indicator for estimation on judge/prosecutor quality of work. The Venice Commission insists on in particular: "The fact that a judge has been overruled on a number of occasions is not necessarily followed by the claim that the judge has not acted in a competent or professional manner. It is, however, reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question."

Competence (efficiency) of the judges/prosecutors was difficult to assessed only on the number of resolved cases without any case weighting rules. In the assessment of the workload of the judges, the Venice Commission insists on assessment of individual cases: "where a judge has concluded a lesser number of cases than required by the orientation norm, or where criminal cases have had to be abandoned due to delays the judge is responsible for."

No Legal Remedy

Possibility for an appeal to an independent court is one of the preconditions for reappointment procedure stressed in the opinion of the Venice Commission.[25] However, the legislation initially did not envisage any legal remedy against the High Judicial Council and State Prosecutorial Council decision on non-reappointment. Only in the reviewing process, the legal remedy was introduced.

Procedural failures

In its opinion on the 2006 Constitution, the Venice commission insisted on the fair procedure of re-appointment – "The procedure has to be fair, carried out by an independent and impartial body and ensure a fair hearing for all concerned".

Constitutional Court of Serbia stressed need to guarantee fair trial standards and issue reasoned individual decisions for each appointed and non-reappointed judge/prosecutor - "the appellant should have been ensured to have all procedural guarantees covered by the right to a fair trial, inter alia, to have a reasoned, individual decision of the High Judicial Council on the termination of his office be adopted, and have the decision include the individualized reasons for his non-appointment, based on the requirements for the appointment of judges prescribed in Article 45 of the Judges' Act and regulated in more detail in the Decision on the Criteria and Standards for Assessing the Qualification, Competence and Worthiness for the Appointment of Judges and Court Presidents, and on data and opinions obtained pursuant to this decision". [26]

However, the State Prosecutorial Council and High Judicial Council violated all standards of fair procedure, transparency, equality of arms, contradictory procedure. The European Commission stressed in its 2010 report "Objective criteria for reappointment, which had been developed in close cooperation with the Council of Europe's Venice Commission, have not been applied. Judges and prosecutors were not heard during the procedure and did not receive adequate explanations for the decisions.".

The HJC made a decision without following transparency principle and inclusion of the profession.[27] According to the Rules of Procedure of the HJC from 2010, the institution sits behind closed doors. Neither members of the

[25] Paragraph 73 of the Opinion.

[26] Position was published at the Constitutional Court of Serbia website, http://www.ustavni.sud.rs, September 1, 2012.

[27] Now Rules of procedures of the HJC and SPC are amended and transparency is included as obligation in their work.

general public nor judges were allowed to participate in the meetings. The Council did not consider this as a lack of transparency. According to their position from that period, transparency is realized through press conferences, the issuance of public statements and announcements on the Council's website.

Capacities of Council to Implement

The HJC/SPC lacked proper experience and human resources to function properly. The Law on HJC and Law on SPC envisaged transfer of personnel and materials needed to execute the jurisdictions established by the law. However, the necessary steps to put in place operational Administrative offices that will support work of Councils had not been taken on time (plan for transfer, hiring decisions, etc.). This is of concern due to its importance relating to the capacity of the HJC administrative office to perform its functions properly. Human resources were a real problem with direct impact on the efficient functioning of the HJC/SPC.

Due to the insufficient capacities of the HJC/SPC the basic administrative activities related to the judiciary were very much linked to the Ministry of Justice, instead to the HJC/SPC Administrative office.

The HJC/SPC had a very short deadline to implement re-election procedure. According to the Law, judges, prosecutors and court presidents shall be appointed within one year from the day of the constitution of the High Judicial Council/State Prosecutorial Council.

Insufficient time and lack of administrative capacities of the HJC/SPC resulted in the appointment of a deceased judge, the appointment of the same judge for two positions, the appointment of the person as a judge and prosecutor at the same time, etc.[28]

In addition, the HJC/SPC published only the list of the re-elected judges and prosecutors, since they did not have enough time and capacity to prepare reasonings.

The lack of capacities resulted in the delay in exercising of many obligations. The proposal to the position of court president, to be elected in Parliament was delayed for more than a year. As a result, each court in Serbia, except for the Supreme Cassation Court, was led by an "acting president". Adoption of relevant bylaws also was delayed (rules on disciplinary procedure, evaluation and promotion of judges, etc.).

[28] Some non-reelected judges submitted criminal charges against some members of the Council but without any effect. Dismissal procedure of the council member is almost impossible according to legislation. Reason for that is need to guarantee Council members independence from any political influence. However, this solution in practice was a problem.

2.2.2. The main challenges and difficulties for Serbia in Law implementation

Assess realistic deadline/timeframe

In practice, it became clear that assessment of realistic timeframe is a big challenge. On the one hand, it is necessary to conduct the whole process in the shortest possible time to ensure legal certainty, on the other hand, it is important to properly collect and review data for each judge/prosecutor in the re-appointment procedure.

Assessment of the realistic deadline should be based on the availability of the data on judges/prosecutors' performance and work. In the system in which exists accurate and comprehensive case management system, as well as regular evaluation of judges/prosecutors' re-election procedure, could be implemented in a relatively short period of time. However, in the systems in which data on judges/prosecutors' performance are collected manually, the institution will need more time and human resources available to conduct the whole process of re-election (vetting).

The legal requirement to finalize reappointment procedure in a one-year period from the appointment of the HJC and SPC members is a short period of time having in mind administrative capacities of Councils and availability of data. The short deadline was defined to avoid legal uncertainty; however, it was not feasible to collect and aggregate all statistical data on the performance of judges and prosecutors.

Selection of adequate institution

Selection of institution that can act independently and impartially is one of the biggest challenges for each country that is planning to organize vetting of judges and prosecutors. According to the Venice Commission opinion, the re-election procedure requires a Council composed of independent and credible personalities and not of political appointees.

The Venice Commission in its opinion stated that for Serbian circumstances the High Judicial Council completely dependent on Parliament would not be a suitable body for carrying out such a procedure.[29]

In Serbian circumstances, the delegation of the reelection procedure to the Councils did not ensure independence and impartiality of the procedure. Participation of the minister of justice and president of Parliamentary Committee for Judicial Affairs, as *ex officio* members of the Councils, in

[29] The National Assembly appoints the eight from eleven members, six of whom should be judges (prosecutors) and two jurists (one university professor of law and one attorney-at-law).

the whole process ensure political influence on the process as well as the procedure for election of other members by the Parliament.

Support of profession

Lack of support of professional association was the main challenge for Serbian authorities. Serbian judicial associations were involved in the justice reform at the beginning; however, Government neglected inclusion of the associations after mid-2007.[30] Exclusion of the associations causes later problems in the re-appointment process.

Both Associations were heavily involved in raising awareness of European associations and professional bodies on the situation in justice reform in Serbia. As a consequence, the Consultative Council of European Judges (CCJE) issued a declaration on the reform of the judiciary in Serbia.[31] According to the CCJE, a re-appointment process with respect to all judges in a country is not at all obvious, and the termination of office of Serbian judges violated the principle of irremovability of judges and international standards. The CCJE requested that those judges who were not re-elected be informed in writing of the specific reasons for which their office has been terminated, and be granted an effective remedy before an independent body. In addition, the CCJE recommended that, pending the review of the decisions of termination, the judges who had been removed be provided sufficient means to cover their living expenses. The CCJE also requested that international bodies such as the Venice Commission and the CCJE, as well as international and national judges' associations, be associated to this independent instance as observers. In addition, MEDEL (European Association of judges and prosecutors for democracy and freedom) issued an Audit report on the situation in Serbia, European Parliament raised concerns on the re-appointment process in Serbia, etc.

[30] The representatives of both associations were involved in the process of the justice reform at the very beginning, when the Strategy Implementation Commission (SIC) was set up in 2006. The ten-member SIC was meant to be the leading body in the implementation of the goals and activities envisaged in the NJRS and the Action Plan (2006-2011). SIC members were representatives of the Ministry of Justice, the Supreme Court, the National Assembly Judiciary Committee, the Public Prosecutor's Office, the Judges' Association, the Prosecutors' Association, the Bar, the Judicial Training Centre, the Belgrade University Law Faculty and the Ministry of Finance. The Members of the Commission were elected by the Government of Serbia on 22 June 2006.
However, after the new government of Serbia took office in April 2007, the SIC practically ceased to exist. Representatives of the Association of Judges had a meeting with the Minister of Justice on 26 December 2007, who reassured them that the SIC would start operating as from the beginning of 2008. However, this did not happen, and on the contrary the Ministry of Justice took over all the SIC's competences. As a result, of the different approaches of the Ministry of Justice, on one hand, and the associations, on the other, towards the issue of general (re)-election, both associations were not initially involved in the process.

[31] CCJE (2010)1 adopted in Strasbourg 20 April 2010.

Assessment of worthiness

It was not clearly defined how worthiness will be assessed. When it comes to *worthiness*, a notion that the HJC/SPC should have specified in each individual case, the Criteria and Standards envisage that *those who are already judges/prosecutors are presumed to be worthy.* How did the HJC/SPC contest the presumption of worthiness, and the basis of which criteria cannot be seen from the re-appointment decisions?

Even after the whole process, it is not clear how worthiness was assessed. Neither the candidates nor the general public has learned how the HJC defined the standard of worthiness for performing the judicial office, nor what evidence was supplied and demonstrated in order to refute this presumption. The statements made by certain HJC members refer to judge's personal file as the source of data for assessing worthiness.

The main concern for the public was the usage of Intelligence service data without legal ground, especially for assessing worthiness. Commissioner for Free Access to data and Protection of Personal Data conducted an inspection to check if SPC and HJC used intelligence data.

2.2.3. Other reasons that contributed to the non-success of this process in your country

Naming the process with right term

"General election" was the term used in legislation instead of re-election, reappointment or vetting procedure. In line with the used term, the procedure was not regulated as a dismissal of judges/prosecutors who had lifetime tenure.

However, the Constitutional Court emphasized that wording cannot change nature of the re-appointment process. In a statement of 25 March 2010, the President of the Constitutional Court informed the public that her court considers the non-election of judges as a case of "termination of office". The statement mentioned that the non-elected judges should have been provided with individual and reasoned decisions. The same applies to the prosecutors who lost their jobs following the general election and brought their case before the Constitutional Court.

Transitory composition of the Councils

The composition of this transitory body was controversial in legislative terms. First, because judge-members were nominated by the former High

Council of the Judiciary, not by judges and prosecutors themselves. Second, because these judge-members were guaranteed a promotion to the higher court once they complete their task, which is a provision of highly corruptible nature.[32]

The candidates for the HJC and SPC transitory composition were nominated by the existing High Council of the Judiciary, *which means that the procedure was completely exempted from the competence of judges as holders of judicial power.* The transitory HJC/SPC composition was entrusted with an extraordinary and a capital task – to nominate candidates in the procedure of re-appointment of judges/prosecutors appointed for the first time and to re-appoint all existing judges/prosecutors, appointed for a permanent tenure pursuant to the 1990 Constitution.

The European Commission expressed in the 2009 Progress Report: the re-appointment was conducted by bodies (HJC and State Prosecutors Council) in illegal compositions,[33] since their composition was transitory; their composition was incomplete; and the representation of the profession, i.e. the judges and the prosecutors in these bodies was *not in conformity with European standards*.

2.2.4. Attempts for improvement

Reviewing procedure

A review procedure of the non-appointed judges and prosecutors was implemented due to the pressure from European instances. The procedure was launched in June of 2011 and lasted until the end of May 2012.

Standard, where no one can decide in the second instance on the case he already decided in the first instance, was violated. According to legislation the permanent composition of the High Judicial Council and State Prosecutorial Council shall review the decision of the transitory composition of the HJC and the SPC on termination of judicial office of judges/prosecutors in accordance with the criteria and standards for assessing the qualification, competence

[32] In addition, when it comes to the first HJC composition and its concrete composition in personal terms, it should be noted that one of the judge-members had conducted one enforcement procedure unjustifiably long, and as a result Serbia was convicted before the European Court of Human Rights for violation of the right to trial within reasonable time.

[33] According to the Serbia 2009 Progress Report of the EU Commission, stated that the transitory composition: *"… contains major weaknesses. As an exception to the general rule, the members representing judges in the first composition of the new High Judicial Council were nominated by the previous High Judicial Council which was not bound by the proposals from the courts. This appointment procedure does not provide for sufficient participation by the judiciary and leaves room for political influence."*

and worthiness, which shall be adopted by the HJC permanent composition.[34] The second-instance process is based on the premise that a different body is deciding since the partially personal composition is changed.[35] In order to eliminate the possibility of the entire process being compromised, the Rules envisage for the possibility (but not an obligation) to have the HJC members who have participated in the adoption of the initial decision refraining from voting or fully exempted from the procedure or parts thereof.[36]

Application of retroactivity principle causes legal uncertainty. The Law on Judges changes the character of appeals submitted to the Constitutional Court. *Ex lege* all proceedings upon the judge's appeals to the Constitutional Court were terminated and the cases were transferred to the HJC and those appeals were considered as petitions to the HJC.[37]

Similar is the opinion of the Venice Commission emphasized in its opinion CDL-AD(2011)015, that this procedure of prequalification and successive exclusion of appeals pending before the Constitutional Court has raised "doubts with respect to the principle of the separation of powers."

The fair procedure was better protected in the review procedure. Positive novelties were: right to inspect case file, the accompanying documents and the course of procedure, as well as to orally present own case before the HJC/SPC permanent composition.

Transparency was not significantly improved. The audio recording of the sessions promised in order to ensure citizen control was not allowed.[38] The principle of the public procedure was not respected during the plenary sessions of the State Prosecutorial Council, because of alleged lack of space. In the case of HJC which respected the principles of public procedure.

Obligations of the HJC/SPC permanent composition were clearly identified. The bylaw envisaged that the decision of the HJC/SPC permanent composition should be reasoned. The bylaw envisaged only appeal to the Constitutional Court as a legal remedy against the decisions of the HJC/SPC from the review procedure.

Monitoring by the PAS

The Association of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia was awarded the status of a "special monitor",

[34] Article 101 paragraph 1 of the Judge' Act (RS Official Herald 116/08, 58/09 – decision of the CC and 104/09).

[35] Minister of Justice, Member of Parliament, Representative of Bar Association and representative of Law faculties remain the same, while six representatives of judges and prosecutors were changed.

[36] In practice, the minutes from the HJC sessions, show that this indeed was not the case.

[37] Non-reappointed judges/prosecutors who did not submit appeal to the Constitutional Court had additional 30 days deadline to submit petition to the HJC/SPC.

[38] MEDEL Audit report.

with the right to ask questions directed at the petitioners and the right to object to the minutes and the procedure as such.[39] In addition to exercising competences from the rules on review procedure, the PAS used possibilities from the Law on free access to information.[40] In addition to the Association of Public Prosecutors, the status of monitors (without the mentioned rights) was granted to the monitors of the European Union Delegation to Serbia, the OSCE and the Council of Europe.[41]

The Association of Public Prosecutors provided Report on the process of monitoring which influenced official documents of the EU. The Report was submitted to the European Delegation, European Commission, OSCE and individual embassies. The conclusions from the Report became part of the 2011 European Progress report for Serbia "As regards prosecutors, certain procedural shortcomings occurred and remaining doubts on the observance of the guidelines will have to be dispelled by the written decisions."

In communication with the public the PAS included international professional association. Colleagues from MEDEL and IAP to assess whole re-election and review process and give media statements. Activities of the PAS were crucial for changing of public perception, especially among the professional public.

3. Conclusions

Vetting of the judiciary should regain trust and strengthen rule of law in the country. However, experience from Western Balkan countries (Bosnia and Herzegovina, Kosovo and Serbia) does not give positive examples and good practice. Learning from mistakes could also help other countries to prevent problems.

Reasons for failure of Serbian vetting process are numerous, from lack of the proper legal ground for termination of function to the challenges in implementation (lack of administrative capacities and short deadlines). In addition, the whole process lacked a clear understanding of reasons for vetting. One of the main results of vetting in Serbia is fear among judges and prosecutors that their position is not permanent and that any new Government and the political majority could use the opportunity of amendments of the Constitution to conduct vetting. This is not in line with rule of law standards and jeopardizes impartiality and integrity of judges and prosecutors.

[39] The PAS monitored only review procedure and only part of interviews with non-reelected prosecutors. PAS monitors used check list to be sure that commission followed all procedural steps. Decision making was behind closed doors so PAS monitors could not monitor this process.
[40] The Commissioner for free access to information exercise his powers based on the PAS initiative and checked if the Councils used intelligence data in decision making.
[41] Article 5 of the Rulebook.

Contrary to Serbian example, Albania vetting process is organized based on the common understanding that it should result in regaining the trust in the judiciary and fight against corruption among judges and prosecutors. In addition, Albania ensured ground for the process in the Constitution and established a comprehensive structure to implement vetting. These steps showed that Albania learned from Serbian mistakes, however, the assessment of criteria in the practice could result in challenges. The coming period will show if it is possible to achieve expected results.

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REIZBOR NOSILACA PRAVOSUDNIH FUNKCIJA U ZEMLJAMA U TRANZICJI – USPEŠAN INSTRUMENT ILI TAČKA POLITIČKOG UTICAJA

Rezime

Autor u radu analizira iskustva u reizboru nosilaca pravosudnih funkcija kao mehanizma za vraćanje poverenja građana u pravosudni sistem. Posebna pažnja posvećena je iskustvima u Srbiji i Albaniji. Uporedna iskustva i praksa ne pokazuju jasnu vezu između procesa reizbora i poverenja građana u pravosuđe. Autor u radu analizira značaj saglasnosti oko razloga za reizbor, kao i značaj pripremnih aktivnosti za sprovođenje reizbora – postojanje osnova u Ustavu, izbor odgovarajuće institucije koja će sprovoditi proces, uključujući osnivanje ad hoc tela, procena potrebnog vremena i administrativni kapaciteti za sprovođenje celokupnog procesa. Takođe, komunikacija sa opštom i profesionalnom javnošću je od ključnog značaja za obezbeđenje podrške tokom čitavog procesa reizbora. Autor u radu daje pregled uporednih praksi, odnosno modela reizbora sprovedenog u Srbiji 2009. godine i tekućeg reizbora u Albaniji. Iako postoje kašnjenja u sprovođenju reizbora u Albaniji, očigledno je da je zakonodavac zasnovao rešenja na iskustvu iz Srbije i uključio mehanizme kojima će se obezbediti transparentnost celokupnog procesa.

Ključne reči: reizbor sudija i tužilaca, integritet, poverenje u pravosudni sistem, korupcija, kriterijumi za reizbor.