CEELI INSTITUTE

ADVANCING THE RULE OF LAW

# GUIDELINES ON JUDICIAL VETTING

March 2024

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# FOREWORD

The CEELI Institute's Guidelines on Judicial Vetting provide an invaluable resource on the extraordinary remedy of judicial vetting that we hope will assist policymakers, judges, practitioners, journalists, and civil society actors alike for years to come both in the region and globally. This new resource is the product of the Central and Eastern European (CEE) Judicial Network, a trusted platform gathering over 370 judges across the region, which the CEELI Institute has been proud to moderate since 2012.

In July 2023, the CEELI Institute launched an inclusive, consultative, and expert-driven initiative to examine the extraordinary phenomenon of judicial vetting. The development of this tool was primarily driven by the CEE Network's core group judges, representing the collaborative effort of 33 judges from different jurisdictions throughout the region.

Written by judges and other legal experts in their respective countries, the Guidelines not only provide a clear discussion of when judicial vetting is appropriate, but also concrete recommendations on how to implement the vetting process when needed. The Guidelines back up its recommendations with carefully researched analysis of relevant international law and a detailed comparative look at how countries in the region have sought to meet this challenge while respecting judicial independence and fundamental rights. In an era when judicial integrity has been called into question through allegations of corruption, these Guidelines strike a thoughtful balance on how to restore the public's trust. CEELI is deeply appreciative of the support provided by the U.S. Department of State's Bureau of International Narcotics and Law Enforcement to this critical and timely project.

*Robert R. Strang*
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## RECOMMENDATIONS

1. **Differentiate exceptional vetting from lustration:** Exceptional vetting procedures should be clearly differentiated from past lustration processes. While both share similarities, it is crucial to recognize the distinctiveness of extraordinary vetting, which is aimed at addressing specific issues within the legal system, from the historical context and purposes of lustration processes conducted in the 1990s.

2. **Differentiate from regular judicial accountability:** Distinguish extraordinary vetting processes from regular mechanisms of judicial accountability, such as integrity checks, performance evaluations, asset assessments, background and security checks (where applicable), and disciplinary proceedings. Clear communication of these distinctions is crucial for a comprehensive understanding of the vetting process.

3. **Evaluate preconditions for vetting:** Before opting for vetting, proof of a systematic problem within the judiciary[1] must be made clear. Examples include widespread corruption, extremely serious deficiencies in the functioning of the judicial system, submission to oligarchic interests, or systemic doubts about the integrity of the judiciary.

4. **Evaluate country-specific considerations:** The situation in each country is different and requires an assessment on its own merits by the national authorities with the assistance of international bodies or organizations, such as the Venice Commission, OSCE-ODIHR, USAID, CCJE, as well as with the assistance of the civil society sector. This collaborative effort ensures that the evaluation considers both local nuances and international standards, leading to a more effective response tailored to the distinct challenges and dynamics of each country.

5. **Evaluate judicial self-governing institutions:** To ensure the effectiveness of alternative measures, it is crucial first to evaluate and possibly enhance the functionality of judicial self-governing institutions and mechanisms, as legally mandated. This step should precede the introduction of any vetting mechanism.

6. **Approach and scope of vetting:**
    - **Make extraordinary vetting a ultima ratio measure:** The vetting procedure should be approached as an *ultima ratio* measure, used only when existing accountability mechanisms are unable to address systemic doubts and deficiencies effectively within the judiciary. Wide political and public support must also be secured. Consider full-fledged vetting only to address and

[1] When used herein, the term "judiciary" encompasses both judges and prosecutors.

combat alarming levels of corruption in the judiciary. Vetting must respond to a pressing *social need*, which is articulated by the ECtHR as a necessary criterion.

- **Consider alternative measures before vetting:** Before considering extraordinary vetting, consider using existing or alternative options. Examples of such options include the following, either individually or in combination with other reforms:
    - Address weaknesses in the administration of justice by strengthening the self-governance bodies where they exist.
    - Improve the integrity and ethical standards of the members of the judiciary through regular performance evaluations.
    - Enhance professionalism of the judiciary through continuous education for members of the judiciary.
    - Address alleged corruption among the members of the judiciary thorough examination of asset declarations.
    - Resolve major issues in judges' performance and behavior through disciplinary processes and, if warranted, criminal proceedings.
- **Identify the purpose and scope of vetting:** Consider that the primary purpose of security vetting is to identify and mitigate potential security risks, such as corruption, foreign interference, or personal biases. In contrast, regular checks by judicial or prosecutorial councils focus on maintaining ethical standards and legal compliance, particularly regarding financial declarations and background checks. It must be stressed that all vetting procedures (pre-vetting, security vetting, and full-fledged vetting), though similar in methodology to regular checks, are distinct and should not be conflated. They are not the same as routine integrity screenings skills assessments for judiciary candidates or performance evaluations of sitting judges seeking promotion.
- **Adhere to foundational principles in extraordinary vetting:** When an extraordinary vetting procedure is considered, it is imperative to adhere strictly to foundational principles and the jurisprudence of the ECtHR. These principles include upholding judicial independence, maintaining objectivity throughout the process, recognizing its temporary nature, and ensuring fair trial rights, effective legal remedy, and alignment with international human rights standards. A commitment to these principles is vital to the legitimacy and effectiveness of the vetting process.
- **Distinguish security vetting from regular checks:** Security vetting in the judiciary is a specific process where financial and integrity checks are conducted on current members of the judiciary by security services. It is important to differentiate this from the routine integrity and financial checks carried out periodically. Unlike these regular checks, security vetting is an exceptional, yet repeatable measure.
- **Distinguish extraordinary vetting from disciplinary and criminal investigations:** Distinction should be made between pre-vetting and vetting processes from criminal or disciplinary investigations. Disciplinary and

criminal investigations concentrate on determining if a disciplinary offense or crime has been committed. In contrast, extraordinary vetting focuses on identifying risks or the likelihood of improper conduct occurring in the future. Both criminal and disciplinary proceedings are aimed at checking individuals, whereas extraordinary vetting aims at checking all judges and prosecutors (or a large group thereof).

- **Differentiate between various types of vetting and their impacts:** A distinction should be made between pre-vetting, security vetting, and full-fledged vetting. Full-fledged vetting stands as an exception to the principle of judicial irremovability, a crucial constitutional safeguard for maintaining judicial independence. This comprehensive process involves evaluating judges and prosecutors based on their assets, background (including any criminal ties), and professional proficiency. Due to its intensive nature and potential to lead to the removal of judges, implementing full-fledged vetting typically requires temporary amendments to the constitution.
- **Define the legal framework for full-fledged vetting responsibilities:** The full-fledged vetting process must be further detailed in the domestic legal framework by defining the duties and powers of the bodies involved in the vetting process, including monitoring bodies and the appeal mechanism.

7. **Respect rights and transparency in the vetting process:** Ensure transparency in both pre-vetting and vetting processes by granting judges and prosecutors access to collected materials and allowing their participation in public hearings. To ensure a transparent process, national authorities must conduct a thorough assessment of the legitimate aim they seek to achieve. This assessment should guide the determination of the type of vetting to be employed. Regardless of the chosen vetting type, strict adherence to procedural rights outlined in Article 6 of the ECHR, respect for the right to privacy per Article 8, and the assurance of the right to an effective legal remedy under Article 13 are imperative.

8. **Clarify the burden of proof:** It is essential to distinguish clearly between pre-vetting and vetting processes when considering the burden of proof. In pre-vetting, a negative evaluation can be based on serious doubt, leading to the disqualification of a candidate from standing for election in a self-governing body. However, they can continue in their current position. In full-fledged vetting, a negative assessment of a current post holder should be linked to an indication of impropriety, a standard lower than the proof beyond reasonable doubt required in criminal proceedings.

9. **Ensure the right to appeal:** The conclusion of the procedure should be marked by a comprehensive and reasoned report or decision from the evaluation commission. In both pre-vetting and full-fledged vetting, decisions made by the commission must be subject to the right of appeal by the individual under assessment. Ensure that right to appeal decisions are made by full-fledged vetting bodies. Appeal bodies can take the form of either a specialized entity within

the domestic legal framework or a court within the established legal system, such as constitutional courts, supreme courts, or cassation courts. Further, consider the possibility for an individual under assessment to file a claim with the ECtHR. This serves as a crucial safeguard, contributing to the fairness of vetting procedures in Council of Europe member states.

10. **Consider vetting's impact:** Consideration should be given to the duration of vetting proceedings and the potential temporary shortage of human resources in the judiciary resulting from the introduction of the vetting process. It is essential to anticipate these consequences and establish contingency plans accordingly.

11. **Consider career implications for judges failing full-fledged vetting:** Countries contemplating the implementation of full-fledged vetting procedures should establish alternative career protocols for members of the judiciary who do not successfully complete the comprehensive vetting process. These can include transitioning judges into roles as advocates.

12. **Assess data handling and legal compliance in vetting:** Countries implementing security vetting must carefully consider how the security services handle the collected data, ensuring adherence to the standards of proportionality and the legitimate aim in accordance with the law. Additionally, the entire process must align with the standards aimed at safeguarding the right to private life outlined in Article 8 of the ECHR. An appeals mechanism is also essential for a fair and comprehensive process.

13. **Incorporate international experts in full-fledged vetting:** Involve international experts. Full-fledged vetting bodies are ad hoc and often incorporate international members or observers to bolster legitimacy. Involvement of international experts may take different forms, such as selecting candidates for vetting bodies, monitoring the vetting process, or providing preliminary advice on draft legislation regarding vetting.

14. **Engage civil society:** Enhance the credibility of vetting procedures by actively involving representatives from civil society. Ensure selection criteria for civil society representatives are merit-based and emphasize gender balance to foster a comprehensive and unbiased vetting process.

15. **Prioritize the establishment and maintenance of a transparent and accountable vetting process.** This includes broadcasting official meetings, public hearings, and evaluations on dedicated websites or social media platforms to build public trust, alleviate uncertainty for assesses, and ensure adherence to fair trial standards. Attention to the terminology used in public is paramount. For example, "pre-vetting" should be described to the public as an extraordinary measure. It is a filtering process applied solely to candidates for self-governing bodies, triggered in response to significant shortcomings in the national judicial

system. If a candidate fails this evaluation, they are disqualified from serving in the self-governing body, but their role as a judge or prosecutor within the national legal system remains unaffected. This distinction is vital because self-governing bodies have considerable power in appointing and promoting judges and prosecutors, which greatly influences the integrity and public trust in the justice system.

16. **Develop a comprehensive communication strategy.** To articulate the vetting process to the public, clearly outline its objectives for establishing an independent, efficient, and accountable justice system prioritizing citizens' interests.

## ABBREVIATIONS

**AC** – Appeal Chamber (Albania)

**CCJE** – Consultative Council of European Judges

**CCPE** – Consultative Council of European Prosecutors

**CISD** – Classified Information Security Directory (Albania)

**COE** – Council of Europe

**CoJ** – Council of Judges of Ukraine (Ukraine)

**ECHR** – European Convention on Human Rights

**ECtHR** – European Court of Human Rights

**FBI** – Federal Burau of Investigations

**HCJ** – High Council of Justice (Ukraine)

**HIDAACI** – High Inspectorate of Declaration and Audit of Assets and Conflict of Interests (Albania)

**HJPC** – High Judicial and Prosecutorial Council (Bosnia and Herzegovina)

**HQCJ** – High Qualification Commission of Judges (Ukraine)

**ICCPR** – International Covenant of Civil and Political Rights

**IJC** – Independent Judicial Commission (Bosnia and Herzegovina)

**IJPC** – Independent Judicial and Prosecutorial Commission (Kosovo)

**IMO** – International Monitoring Operation (Albania)

**IOs** – International Observers (Albania)

**IPN** – Institute of National Remembrance (Poland)

**IQC** – Independent Qualifying Commission (Albania)

**JSAP** – Judicial System Assessment Program (Bosnia and Herzegovina)

**KJC** – Kosovo Judicial Council (Kosovo)

**KPC** – Kosovo Prosecutorial Council (Kosovo)

**MPs** – Members of Parliament (Poland)

**NABU** – National Anti-Corruption Bureau (Ukraine)

**PACE** – Parliamentary Assembly of Council of Europe

**PC** – Public Commissioner (Albania)

**SCJ** – Supreme Court of Justice (Moldova)

**SCM** – Superior Council of Magistracy (Moldova)

**SCP** – Superior Council of Prosecutors (Moldova)

**SJC** – Supreme Judicial Council (Poland)

**SOA** – Security Intelligence Agency (Croatia)

**SPC** – State Prosecutorial Council (Serbia)

**UNCAC** – United Nations Convention Against Corruption

**UNSCR** – United Nations Security Council Resolution

**USKOK** – State Prosecutor‘s Office for Organized Crime and Corruption (Croatia)

**VC** – Venice Commission

**VONS** – Committee for the Defense of the Unjustly Prosecuted (Czech Republic)

## GLOSSARY

Recognizing the variety of terms used by different jurisdictions and courts, this Glossary provides definitions for the terms referred to in this document.

- **Assessee:** Typically refers to an individual who is undergoing an assessment or evaluation, particularly about their qualifications, integrity, ethical standards, and other relevant criteria. The assessee, in this context, is usually a judge or prosecutor who is subject to scrutiny to determine their suitability for continued service in the judiciary.

- **Full-fledged vetting:** An exceptional, comprehensive, and extraordinary assessment of all members of the judiciary and its self-governing bodies.

- **Lustration:** A screening process of individuals–often public officials, civil servants, or members of specific professions in post-authoritarian and non-democratic regimes–designed to remove from public office those involved in abuses, including human rights abuses, or who collaborated with past regimes.

- **Pre-vetting:** A filtering process aimed at the evaluation of candidates for positions in self-governing bodies of judges or prosecutors. The importance of such a filtering process lies in the fact that self-governing bodies play a prominent role in the appointment and promotion of judges and prosecutors and thereby impact the integrity of the judicial and prosecutorial system and the quality of and trust in the justice system.

- **Regular mechanisms of judicial accountability:** Non-extraordinary, common, and non-controversial measures used by self-governing judicial bodies to conduct integrity checks, performance evaluations, asset evaluations, background and security checks (depending on the country), and disciplinary proceedings.

- **Security vetting:** An exceptional, repeatable, and specific process where financial and integrity checks are conducted on judiciary members. Because this vetting is carried out by security services it differs from routine integrity and financial checks.

## EXECUTIVE SUMMARY

Imagine a scenario where corruption has deeply rooted itself in the legal system, rendering itself resistant to reforms. Assessments and progress reports consistently show a judiciary perceived as "captured" and lacking public trust. Efforts to enhance the reputation of the judiciary and prosecution services have failed, as persistent corruption erodes public confidence in the fairness of the legal system. This scenario presents an urgent dilemma: How can corruption be tackled without undermining judicial independence?

CEELI's Guidelines on Judicial Vetting offer potential solutions. They provide a comprehensive, structured approach for conducting effective vetting to help restore public trust in and integrity of the judiciary. Ultimately, the decision to implement vetting as a remedy lies with national authorities. That decision, however, should be guided by informed, careful consideration of the potential impacts on judicial independence and the overall effectiveness and credibility of the justice system. This necessitates a balanced strategy, incorporating both external and internal oversight mechanisms, to ensure accountability while preserving the independence essential to a fair and impartial judiciary.

Judicial vetting, a relatively new concept, has emerged as an extraordinary, temporary anti-corruption instrument to ensure the integrity and accountability of judges and prosecutors and, by extension, the judiciary. As a novel instrument, vetting is not yet officially incorporated in international documents governing judicial independence, transparency, and accountability. However, it is broadly recognized as an essential mechanism in countries grappling with systemic judicial corruption. According to the European Commission for Democracy Through Law, an advisory body of the Council of Europe better known as the Venice Commission, vetting "involves the implementation of a process of accountability mechanisms to ensure the highest professional standards of conduct and integrity in public office."[2]

**At its core, vetting can be described as an extraordinary, temporary anti-corruption tool involving an in-depth examination and assessment of judges, prosecutors, and officials within high judicial and prosecutorial councils.**

It aims to verify assessee's suitability, financial interests, ethical standing, qualifications, potential conflicts of interest, and adherence to the principles of justice. This process has garnered significance as a response to the escalating distrust in the judiciary within Eastern and Southeastern European countries and is viewed as an instrument to restore public trust and uphold the highest standards of professionalism and integrity among legal practitioners.

[2] European Commission for Democracy Through Law (Venice Commission). (December 2022). *Compilation of Venice Commission Opinions and Report Concerning Vetting of Judges and Prosecutors*, Paragraph 9. https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)051-e

Although international documents on judicial independence, transparency, and accountability do not formally recognize vetting, these Guidelines synthesize various definitions and policies from the Venice Commission, the Consultative Council of European Judges (CCJE), and the Consultative Council of European Prosecutors (CCEP), as well as the applicable jurisprudence of the European Court of Human Rights (ECtHR). Collectively, these bodies view vetting as an extraordinary, targeted, temporary, and last resort measure to address corruption within the judiciary. The Venice Commission supports vetting, consistent with judicial accountability and human rights principles. Further, the ECtHR endorses vetting as an extraordinary process for maintaining professional integrity and standards in public service, provided it pursues a legitimate aim, adheres to proportionality standards, is a necessity in a democratic society, and respects due process in accordance with the ECHR.

In 2023, prompted by numerous requests from judges within the CEELI Institute's Core Group of Judges of Central and Eastern Europe, CEELI launched an inclusive, consultative, and expert-driven initiative to examine judicial vetting, define its scope, and assess its impact on judicial independence, transparency, and accountability. Additionally, it sought to understand how vetting affects public trust in the judicial system and the rule of law. These comprehensive Guidelines on Judicial Vetting represent the collaborative effort of 33 judges and experts from jurisdictions throughout Eastern and Southeast Europe, including judges of the Supreme Court of Ukraine, which is implementing a vetting process during war. These Guidelines serve as a resource–prepared by judges and experts–for judges, policymakers, and the media. They serve as a guide to understanding and executing vetting procedures with more targeted precision, offering both clarity and direction. Beyond providing guidance, these Guidelines elucidate the relationship between vetting and lustration mechanisms, distinguish various vetting types, and provide a roadmap for the effective implementation of vetting processes. They also emphasize adherence to international principles and standards, ensuring fairness, privacy, and transparency in vetting. Additionally, the Guidelines consider the interests of media and civil society.

## INTRODUCTION TO THE GUIDELINES

These Guidelines present a comprehensive overview of vetting processes, including their nature, types, reasons for being considered exceptional, distinctions from lustration, and the necessary conditions to be met before implementation. Additionally, the Guidelines elaborate on the practical implementation of various vetting types across European countries, aligning them with the definitions provided by the Venice Commission and the jurisprudence of the ECtHR.

International standards regarding vetting emphasize that, for such extraordinary measures to be considered, the state must demonstrate that the judiciary has been severely compromised to the point where regular accountability measures for judicial members are ineffective in ensuring independence, impartiality, and integrity. The Guidelines underscore that exceptional vetting proceedings demand a very high threshold to preserve the fundamental principle of judicial independence. However, if vetting is appropriate, it must adhere to the standards set by the ECtHR, ensuring legality, proportionality, a legitimate aim, and necessity in a democratic society.

Vetting procedures involve an exceptional assessment of judicial members' integrity, competence, and professionalism. These external evaluations are conducted by specially and temporarily convened bodies not part of the regular justice system and consisting of international and national individuals with high integrity. Vetting can manifest in various forms, such as the evaluation of self-governing bodies of judges and prosecutors, external assessments of high-level courts, and comprehensive evaluations of all participants in the justice system.

These Guidelines are presented in four distinct sections, each focusing on different aspects of judicial vetting. The Guidelines begin with recommendations from the authors, offering valuable insights into the most critical aspects of the vetting process. These recommendations serve as a practical guide for understanding and effectively implementing the vetting process. Chapter 1 explores the differences between vetting and lustration, delves into international standards, and categorizes vetting types. The content covers distinctions between regular judicial accountability measures and extraordinary vetting, addressing security, composition, procedures, appeal processes, and post-vetting considerations. Furthermore, it scrutinizes distinctions with regular vetting practices for federal judges in the United States. This Chapter also emphasizes the crucial role of civil society organizations in vetting proceedings, emphasizing their influence, recognizing the necessity of transparency, cautioning against sensationalism, and highlighting how they shape public perception, with a focus on the human impact of vetting. Chapter 2 shifts the focus to vetting and lustration processes in Eastern and Southeast Europe, providing insights into selected countries' experiences with lustration and judicial vetting. This chapter details each aspect of the vetting process within the national jurisdictions of each country. Attached to these Guidelines, at the very end, are pivotal cases from the Constitutional Court of Slovakia, as well as essential cases

from the jurisprudence of the European Court of Human Rights. These cases meticulously illustrate the respective court‘s stance on ensuring procedural rights within comprehensive vetting procedures. They serve as valuable references, providing insights into the guiding principles surrounding procedural rights in vetting proceedings.

# CHAPTER 1.
# UNDERSTANDING EXTRAORDINARY JUDICIAL VETTING

## Extraordinary Vetting vs. Lustration

To fully understand vetting processes, it is essential to begin by contextualizing how they differ from lustration.

1. Judicial vetting and lustration processes are one-time, temporary, and extraordinary assessments of sitting members of a judiciary aimed to remove from office individuals lacking integrity, having inappropriate associations, or other issues compromising the legal system's fairness and credibility. These processes are intended to rebuild public trust in institutions. While vetting and lustration share some similarities,[3] they differ significantly in their purposes, scopes, processes, outcomes, historical contexts, and legal frameworks.

2. Lustration standards derived from PACE resolutions, ECHR principles, and ECtHR jurisprudence. PACE's 1996 Resolution emphasized enacting national laws to respect procedural rights, appeal rights, and adherence to the principle of individuality, ensuring each case is evaluated on its own merits rather than subjecting individuals to judgments based on group affiliations or broad categorizations. It limited the lustration process to public sector positions, proposed a five-year period for lustration, excluded the private and semi-private sectors, and stipulated the completion of lustration processes by 1999.[4]

3. Lustration, practiced in post-authoritarian and non-democratic regimes, was a form of transitional justice. It aimed to remove from public office individuals who were involved in abuses, including human rights abuses, or who collaborated with past regimes. Its purpose was to restore public trust in the judiciary and protect the newly emerged democracy rather than to punish people. As emphasized in the PACE Resolution, it should not be used for revenge or to achieve political goals. The lustration process was complex, and controversial, often necessitating constitutional amendments, and was carried out only by national administrative authorities or commissions. In contrast, vetting could be conducted either by national councils of the judiciary or by an international vetting commission. The composition of the international vetting commission varies based on the type of vetting selected, including the option of a full team of international experts or a mixed composition involving both national and international experts.

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[3] *Ibid.* Lustration is a specific type of vetting. According to the Venice Commission, "classical lustration-type vetting, which seeks to remove from the public offices, individuals who had close ties to the previous non-democratic regimes and, as such, cannot be trusted to serve the new democratic regime or are found unworthy of representing such a regime."

[4] Parliamentary Assembly of the Council of Europe (June 1996). Resolution 1096 (1996)1. Measures to dismantle the heritage of former communist totalitarian systems. https://pace.coe.int/en/files/16507

4. ECtHR jurisprudence did not delegitimize lustration processes; instead, it has recognized their legitimacy. The ECtHR has consistently emphasized the need to respect individuals' procedural and privacy rights in accordance with the ECHR. Additionally, the court recognized that in some instances, the interests of the state might warrant maintaining the confidentiality of certain documents, including those from former regimes.[5]

| (Lustration) Chamber judgment Ivanovski v. the Former Yugoslav Republic of Macedonia (App. Nm.29908/11) | (Lustration) Chamber judgment Ždanoka v. Latvia, Matyjek v. Poland (App. Nm.38184/03) and Bobek v. Poland (68761/01) |
|---|---|
| The European Court of Human Rights (ECtHR) found no violation of Article 6 (right to a fair trial) regarding the alleged lack of access to court but identified a violation of Article 6 due to the overall unfairness of the lustration proceedings and a breach of Article 8 (right to respect for private and family life). The ECtHR deemed a public statement by the Prime Minister, accusing a member of the Constitutional Court of collaboration with security services during ongoing lustration proceedings, incompatible with the concept of an „independent and impartial tribunal" under Article 6(1). The national courts' analysis was considered insufficient, and the imposed ban on the applicant's employment in public service or academia for five years was deemed disproportionate to the legitimate aim sought to be achieved, resulting in a violation of Article 8. | In Ždanoka v. Latvia, the European Court of Human Rights (ECtHR) ruled that barring the applicant from parliamentary elections due to her past affiliation with the Communist Party of the Soviet Union violated her right to stand for election under Article 3 of Protocol No. 1 to the European Convention on Human Rights. The Court deemed the legislation discriminatory and lacking a legitimate aim. Similarly in Matyjek v. Poland and Bobek v. Poland, the ECtHR determined that lustration proceedings against the applicants were unfair, breaching their rights under Article 6 (right to a fair trial) of the European Convention on Human Rights. The Court found the proceedings disregarded the presumption of innocence principle. |

5. Vetting, in contrast to lustration, is a more targeted, extraordinary anti-corruption measure used to remove corrupt legal actors from the judiciary by a specialized body. Generally, it involves a thorough and transparent evaluation of the qualifications (depending on the type of vetting), financial background, ethics, and potential conflicts of interest of judiciary members or public officials to verify their suitability for specific roles and preserve institutional integrity.

6. International instruments for the independence of the judiciary do not explicitly envisage the vetting process as a measure. Nevertheless, the Venice Commission has supported it as a valid mechanism in multiple opinions, finding that it

[5] Judgement of Matyjek v. Poland, application number 38184/03.

aligns with judicial accountability and human rights principles. The Venice Commission defines vetting as an *"extraordinary process to ensure that public officials meet the highest standards of professional conduct and integrity, using accountability measures to evaluate their suitability for office."* It views both pre-vetting and vetting as exceptional, temporary measures. Furthermore, vetting as a mechanism has been recognized by ECtHR jurisprudence.

7. The CCJE takes a more cautious approach to vetting, stressing that vetting must be a measure of last resort. It warns of the potential misuse of vetting in the judiciary, particularly to remove politically "undesirable" judges. The CCJE advocates for independent institutions, especially judiciary councils, to oversee vetting, safeguarding judicial independence. Moreover, the CCJE does not exclude the possibility for the Councils of the Judiciary to be subject to vetting proceedings, as a measure of last resort, where an international body would perform the procedure.[6]

## Extraordinary Vetting and Regular Mechanisms for Judicial Accountability

8. Vetting should not be confused with regular mechanisms of judicial accountability, such as integrity checks, performance and asset evaluations, background and security checks (depending on the country), disciplinary proceedings, and similar processes.

9. The vetting procedure should be considered as an ultima ratio measure when existing accountability mechanisms cannot address the systemic doubts and deficiencies of the judiciary. Before considering vetting proceedings it is imperative to assess whether the systemic problems in the judiciary can be addressed by existing ordinary mechanisms of judicial accountability.

10. Should vetting, as an exceptional accountability procedure, be considered, it is crucial to adhere to the principles of judicial independence, objectivity, temporariness, due process of law, and adherence to international principles of human rights.

11. Vetting, as an extraordinary measure, must not be confused with the regular vetting process in the United States to conduct background investigations on candidates for federal judgeships.

## International and European Standards on Vetting of the Judiciary

12. The vetting process is in accordance with well-established principles of judicial independence and accountability. These include principles outlined in the UN

[6] Consultative Council of European Judges. (November 2021) *Evolution of the Councils for the Judiciary and their Role in Independent and Impartial Judicial Systems*. CCJE Opinion No. 24 (2021). Paragraphs 22 and 23.

Basic Principles on the Independence of the Judiciary (1985),[7] the UN Bangalore Principles of Judicial Conduct (2002), and various Council of Europe recommendations.[8]

13. At the global level, pre-vetting and vetting processes are in line with United Nations instruments. The UN Human Rights Council Resolution on the independence and impartiality of the judiciary, jurors, and assessors, and the independence of lawyers,[9] reinforces the crucial roles of accountability, transparency, and integrity in the judiciary. It affirms that these values are central to maintaining judicial independence and are vital for the rule of law.

14. Viewing the extraordinary vetting process as an anti-corruption measure, the UN Convention against Corruption is explicitly referenced in Xhoxhaj v Albania. This citation underscores the significance of accountability, transparency, and integrity in the judiciary and prosecution services. Moreover, the jurisprudence of the ECtHR directly incorporates quotes from the Council of Europe's Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.[10] These conventions provide guidelines and measures to prevent and address corruption in criminal and civil domains while promoting cooperation among member states. These instruments emphasize the importance of adhering to human rights principles and ensuring a fair trial during extraordinary vetting. They also address corruption within the judiciary to maintain its integrity and signify a commitment to international standards in the broader fight against corruption at both the national and international levels.

15. Regarding fair trial rights, ECtHR jurisprudence underscores the importance of fair trial rights, respect for privacy rights, and access to legal remedies within the vetting process.[11] Specifically, Article 6 guarantees the right to a fair and public hearing "by an independent and impartial tribunal established by law," Article 8 guarantees the right to respect private and family life, and Article 13 ensures the right to an effective legal remedy.

16. Regarding independent and impartial tribunal rights, it is important to evaluate whether a vetting body is an "independent and impartial tribunal established by law" under the ECHR. The ECtHR evaluates the process used to appoint members, the duration of their tenure, measures to safeguard against external pressures, and the overall appearance of the body's independence. Further, when evaluating the impartiality of a member of a vetting body, the ECtHR

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7 United Nations Congress on the Prevention of Crime and the Treatment of Offenders (December 1985). *Basic Principles on the Independence of the Judiciary*. https://www.icj.org/wp-content/uploads/2014/03/UN-Basic-principles-independence-judiciary-1985-eng.pdf

8 See Council of Europe Recommendation CM/Rec (2010)12 on Judges: Independence, Efficiency, and Responsibilities (2010); Council of Europe Recommendation CM/Rec (2019)16 on the Council for the Judiciary (2019).

9 See Human Rights Council resolution 44/8 of 14 July 2020.

10 See United Nations Office on Drugs and Crime (2004); United Nations Convention against Corruption (Article 10).

11 See Judgment of Luka v. Romania (application number 34197/02). For further comparison, see also Xhoxhaj v Albania (application number 15227/19).

differentiates between subjective and objective tests. The subjective test examines the member's personal perspectives in a specific case. In contrast, the objective test evaluates whether the member's conduct offers enough assurance to eliminate legitimate doubts about their impartiality.

17. Regarding privacy concerns (both for assessee and their family members), these concerns are deemed inapplicable when investigating the unexplained wealth of public officials.[12] However, any infringement on an individual's private life is permissible only under specific conditions: it must be justifiable under the constraints set out in Article 8(2) of the ECHR and must be proportionate to the objective it seeks to achieve.

18. Regarding the right to an effective legal remedy, under the jurisprudence of the ECtHR, there is a requirement for an appellate body to review the decisions made by a vetting commission. This appellate body is tasked with examining the facts of each case and correcting any procedural errors made by the vetting commission, while also considering the fundamental rights of the person being assessed. It has the authority to either uphold, modify, or overturn the decisions made by the vetting commission.

## Types of Vetting

Vetting is an inclusive national consultative process involving all relevant stakeholders, including civil society organizations.[13] Vetting may manifest in various ways, including the external assessment of members within self-governing bodies of judges and prosecutors, the external evaluation of high-level courts, or the external evaluation of all actors within the justice system. To understand the differences between various vetting procedures it is crucial to bear in mind their exceptional and *ultima ratio* nature as well as the legitimate objectives behind their implementation. The Venice Commission, along with findings from other authors, outlines three key extraordinary vetting processes for members of the judiciary. These include pre-vetting, which serves as an initial assessment; periodic security checks, which provide ongoing evaluation; and comprehensive or full-fledged vetting, which is a more thorough examination.[14]

## Pre-Vetting Proceedings

19. There are two avenues to explore pre-vetting as a mechanism. One avenue refers to the pre-vetting of candidates as a non-extraordinary, common, and non-controversial measure for all candidates of the judiciary and self-governing

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12 See Judgement of Nikehasani v. Albania, (Application no. 58997/18).

13 European Commission for Democracy Through Law (Venice Commission) (October 2023). *Georgia: Follow-up Opinion to Previous Opinions Concerning the Organic Law on Common Courts*. https://www.venice.coe.int/webforms/ documents/default.aspx?pdffile=CDL-AD(2023)033-e

14 European Commission for Democracy Through Law (Venice Commission) (December 2022). *Compilation of Venice Commission Opinions and Reports Concerning Vetting of Judges and Prosecutors*. https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)051-e

bodies.[15] The first understanding encompasses the integrity check and evaluation of assets declarations of candidates for judicial or prosecutorial positions. Such a measure is widely accepted and in principle non-controversial.[16]

20. The second understanding pertains to pre-vetting as an extraordinary measure applicable only to candidates to self-governing bodies.[17] Similar to vetting, it may be undertaken in case of serious shortcomings in the functioning of and trust in the national judicial and prosecutorial system. The situation in each country is different and requires an assessment of its own merits by the national authorities. (See Chapter 2 of the Guidelines).

21. The second understanding of pre-vetting is a filtering process aimed at the evaluation of candidates for positions in self-governing bodies of judges or prosecutors. In case a judge or prosecutor does not pass such a filtering process, the person can no longer be a candidate for election in that self-governing body, but ordinarily will continue to function as a judge or prosecutor in the national legal system. The importance of such a filtering process lies in the fact that self-governing bodies play a prominent role in the appointment and promotion of judges and prosecutors and thereby have a huge impact on the integrity of the entire judicial and prosecutorial system and the quality of and trust in the justice system.

22. The purpose of pre-vetting is to increase the integrity of future members of self-governing bodies and to increase society's trust in the activities of such self-governing bodies, the integrity of judges and prosecutors, and the trust in the justice system overall.

23. For each avenue, the focus of pre-vetting is on checking financial, professional, and ethical integrity standards.

24. Pre-vetting and vetting processes are different from criminal or disciplinary investigations. In such investigations, the focus is on whether a criminal or disciplinary offense has been committed. With vetting, the focus is on the identification of risks or likelihoods that improper conduct will happen in the future.

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15 As to the evaluation of judges, the Venice Commission, in Opinion 2200/2022 from October 13, 2022, stipulates that "pre-vetting" of candidates and integrity checks exercised through the evaluation of asset declarations are common and uncontroversial in principle, but extraordinary vetting might only be justified in case of exceptional circumstances.

16 *Ibid.*

17 Point 9 of the Joint Opinion of the Venice Commission of DGI of the Council of Europe CDLAD (2023)005 of March 14, 2023, stipulates that "in 2021 the authorities created an evaluation mechanism (pre-vetting) for the candidates for the positions in the two Councils – the Superior Council of Magistracy ("the SCM") and the Superior Council of Prosecutors ("the SCP")." In point 104, the Venice Commission notes" [i]n 2022 the authorities proposed to submit the sitting judges of the Supreme Court of Justice ("the SCJ") to the vetting procedure, and, finally, the draft Law under consideration extends this mechanism, called "full vetting," to over one third of all judges and prosecutors (with some exceptions)." https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)005-e

25. In principle, once an individual has acquired the status of a judge or prosecutor, it is essential to presume the qualities of integrity and competence until evidence to the contrary is established. This evidence can only emerge from an assessment of disciplinary or functional performance, conducted through appropriate legal procedures. Pre-vetting or vetting processes are justified and/or necessary exclusively in extraordinary circumstances. The absence of disciplinary sanctions or negative decisions regarding asset declarations does not, by itself, provide sufficient guarantees that judges or prosecutors have adhered to the criteria of integrity. Consequently, in the execution of their duties, pre-vetting and vetting commissions should not rely solely on the conclusions of other entities that have assessed candidates' financial or ethical integrity.

26. The ethical integrity evaluation examines whether judges or prosecutors have breached ethical and professional conduct rules, whether there are suspicions of committing acts of corruption, and whether they have failed to comply with the requirements for declaring assets, interests, or conflicts of interest. This includes obligations related to tax payments and asset declarations. The evaluation scrutinizes both actions and inactions of the candidates to determine if they have significantly violated ethical norms or engaged in conduct that would be considered unacceptable by legal professionals or impartial observers.

27. The financial integrity evaluation relates to an assessment of whether judges or prosecutors have complied with obligations relating to the declaration of assets in a manner established by law and wealth acquired over time. This evaluation relates also to the compliance with tax regimes, the methods of acquiring property, the sources of income and the existence of loans or donations.

28. The procedure to be followed in the context of pre-vetting or vetting can largely be the same. The evaluation commission will normally engage in a collection of materials from the judge or prosecutor and public or private authorities. The exact powers of such an evaluation commission depend on the law on which that commission has been established. Evaluation commissions ordinarily engage in asking questions from judges or prosecutors to address issues about which a commission may have serious doubts.

29. Both in pre-vetting and vetting processes, a shift in the burden of proof is allowed, in the sense that once an evaluating body has identified integrity issues, the burden of proof may shift to the judge or prosecutor under evaluation to provide information that can mitigate the integrity concerns identified. The applicable standard of proof is, however, different in pre-vetting and vetting processes. In the context of pre-vetting, a serious doubt is sufficient for a negative evaluation of a candidate because of which the judge or prosecutor concerned can no longer stand for election in a self-governing body. Notwithstanding, the judge or prosecutor can continue to function in their position. In the case of vetting, the decision to assess negatively a current post holder should be linked to an indication of impropriety. This is however still a lower standard than proof beyond reasonable doubt. The latter standard only applies to criminal proceedings.

30. Judges and prosecutors are entitled to have access to the materials collected and to participate in public hearings. At times also other persons may be heard if such persons may be able to provide information relevant to the evaluation. The procedure ends with a reasoned report or decision by the evaluation commission. In case of a pre-vetting process, the commission will adopt a decision that is subject to the right of appeal by the evaluated judge or prosecutor.

31. In principle, both in pre-vetting and vetting processes, the composition of the evaluation body may consist of a mix of national and international experts. The participation of an international component is considered a necessary guarantee for the independence and quality of the evaluation process.

## Security Vetting[18]

32. Security vetting in the judiciary is a specific process where financial and integrity checks are conducted on current members of the judiciary by security services. This assessment aims to ensure adherence to vital security standards and includes reviewing criminal records, financial backgrounds, and associations with foreign security services, among other considerations. It is important to differentiate this from the routine integrity and financial checks carried out periodically. Unlike these regular checks, security vetting is an exceptional, yet repeatable measure.[19]

33. The primary purpose of security vetting is to identify and mitigate potential security risks, such as corruption or foreign interference. In contrast, regular checks by judicial or prosecutorial councils focus on maintaining ethical standards and legal compliance, particularly regarding financial declarations and background checks.

34. Security vetting involves the participation of security services in collecting information about current judges and prosecutors, as well as from individuals aspiring to judicial positions. Implementation of the process does not necessitate constitutional amendments; rather, it requires modifications to existing laws.

35. Countries implementing security vetting must carefully consider how the security services handle the collected data, ensuring adherence to the standards of proportionality and the legitimate aim in accordance with law. Additionally, the entire process must align with the standards aimed at safeguarding the right

[18] The term “security vetting” is used by the Venice Commission in Opinion No. 1073/2021 on the Introduction of the Procedure of Renewal of Security Vetting Through Amendments to the Courts Act. Adopted at the 130th Plenary Session, Venice and online, March 18-19, 2022. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)005-e

[19] To date, security vetting has been proposed by only two European countries (Croatian and Slovakia). Therefore, the assessment is based only on the Venice Commission’s Opinion on The Introduction of The Procedure of Renewal of Security Vetting Through Amendments to the Courts Act of Republic of Croatia, Opinion nm. 1073/21, CDL-AD (2022)005. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)005-e

to private life outlined in Article 8 of the ECHR. An appeals mechanism is also essential for a fair and comprehensive process.

36. The CCJE urges that distinction should be made between candidate judges entering the judiciary and serving judges, elaborating that screening of judges for corruption could be misused to eliminate politically "undesirable" judges.[20]

37. The Venice Commission urges that such security vetting, if adopted, must operate within constitutional guarantees, particularly respecting the judiciary's independence. Such processes are justified only in exceptional circumstances and after all other judicial accountability methods have been exhausted.

38. In the case of Slovakia, the Constitutional Court found that the involvement of the National Security Authority in the judicial selection process was inconsistent with the constitutional and statutory frameworks governing the competencies of high judicial or prosecutorial councils. The lack of transparency and justification for the National Security Authority's role raised constitutional concerns, leading to the Slovakian Constitutional Court ruling in favor of the complainant. The Slovakian Constitutional Court emphasized the importance of equal treatment and criticized the involvement of a security officer in questioning candidates during Judicial Council sessions, concluding that this function should lie solely with the Judicial Council. The Constitutional Court also criticized with the National Security Authority's role in preparing minutes and audio recordings, as it could compromise the objectivity of the proceedings. Moreover, holding the meeting at the National Security Authority's premises and the failure to properly evaluate and explain the reasons for a candidate's unsuitability were also deemed constitutionally unsustainable, and thus an infringement on the applicant's fundamental rights was found.[21]

39. In the case of Croatia, the Venice Commission identified issues with the draft law and existing legal frameworks, noting the absence of clear criteria for evaluating security obstacles. The proposed questionnaire to judges in Croatia was found to be overly broad, leading to uncertainties about how to define the misuse of a judge's official position and what constituted a security obstacle as a disciplinary offense. The Venice Commission recommended that the law should clearly define the criteria for identifying security obstacles and explicitly state what qualifies as a disciplinary offense. Additionally, it recommended the "law should provide for an explicit presumption in favor of the judge subject to security

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20 "In no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption of judges is an offense and should therefore be tackled within the framework of established legislation." See CCJE Opinion No. 21, *Preventing Corruption Among Judges*, paragraph 27. https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruptionamongst-judges/native/16808fd8dd

21 See Constitutional Court of the Slovak Republic, Case No. IV ÚS 621/2018 of October 7, 2021. Failure to meet the prerequisites for judicial competence (candidate for the post of judge). Attendance of a National Security Authority officer at a session of the Judicial Council and the questions posed by him to the candidate. See also Ruling of the Constitutional Court of the Slovak Republic, Case No. IV ÚS 224/2020 of October 6, 2021. Unacceptable interference by an NSA officer in the voting of the Judicial Council.

vetting: if the information is not sufficient to clearly establish a security obstacle, there should not be any consequences for him or her as a result of the security vetting process."[22]

40. It must be stressed that all vetting procedures (pre-vetting, security vetting, and full-fledged vetting), though similar in methodology to regular checks, are distinct and should not be conflated. They are not the same as routine integrity screenings skills assessments for judiciary candidates or performance evaluations of sitting judges seeking promotion.

**Regular practices like asset declarations, financial disclosures, psychological tests, or other established methods are not extraordinary and do not constitute vetting. Additionally, ordinary disciplinary actions against judiciary members for disciplinary offenses are also not considered vetting procedures.**

## Full-Fledged Vetting

41. Full-fledged vetting, just as pre-vetting and security vetting, is an exceptional, comprehensive, and extraordinary assessment of all members of the judiciary and its self-governing bodies. Full-fledged vetting stands is an exception to the principle of judicial irremovability, a crucial constitutional safeguard for maintaining judicial independence. Therefore, the process often requires temporary amendments to the constitution.[23] The full-fledged vetting process re-evaluates sitting judges and prosecutors based on their assets, background (including ties to organized crime), and professional proficiency. The primary aim of this process is to restore the effective operation of the rule of law, ensure genuine judicial independence, and rebuild public trust in judicial institutions.

42. Full-fledged vetting may respond to "alarming levels of corruption in the judiciary and to the urgent need to combat corruption. In such circumstances, a reform of the justice system entailing the extraordinary vetting of all serving judges and prosecutors responds to a pressing social need," which is articulated by the ECtHR as a necessary criterion.

43. As for the requirements for full-fledged vetting, the ECtHR noted that "according to the Bangalore Principles of Judicial Conduct, judges, who, by the nature of their work are considered to be guarantors of the rule of law, must be required to meet particularly high standards of integrity in the conduct of their private matters out of court–"above reproach in the view of a reasonable observer"–in order to maintain and enhance the confidence of the public and "reaffirm the people's faith in the integrity of the judiciary."

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22 *Ibid* Venice Commission Opinion, paragraph 37.

23 In some cases, constitutional amendments are not required. See Venice Commission & Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe (2023, March 14). *The Draft Law on the External Assessment of Judges and Prosecutors*. CDL-AD (2023)005. Adopted at the 134th Plenary Session of the Venice Commission, Venice, March 10-11, 2023. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)005-e

44. Full-fledged vetting bodies are *ad hoc* and often incorporate international members or observers to bolster legitimacy. Involvement of internationals may take different forms, such as selecting candidates for vetting bodies, monitoring the vetting process, or providing preliminary advice on draft legislation regarding vetting.

45. The inclusion of international members or observers may serve a dual purpose: it ensures adherence to international standards and practices while providing an objective perspective that might be less influenced by local biases, politics, or corporatism. The presence of these international members or observers, preferably renowned experts, thus lends credibility to the vetting process. Their participation is seen to maintain transparency and fairness in the evaluation of judicial officials, thereby building greater public trust in the vetting process.

46. The full-fledged vetting process must be further detailed in the domestic legal framework by defining the duties and powers of the bodies involved in the vetting process, including monitoring bodies and the appeal mechanism.

47. Adherence to the ECtHR standards regarding the legality of the integrity background checks, guarantees of a fair trial, and right to privacy and family life is crucial.

48. The right to appeal decisions of the full-fledged vetting bodies is essential. The Composition and the way of selection of the members of the appeal body must fulfill the criteria of "tribunal established by law" in the meaning of Article 6 of the ECHR. It might be either a special body established in the domestic legal framework or a court within the established legal system (such as constitutional courts, supreme courts, or cassation courts).

49. Before the implementation of the vetting process, what must be kept in mind is the possibility for an assessee to file a claim to the European Court of Human Rights, which serves as an important safeguard of fairness of the vetting procedures in the member states of the Council of Europe. The ECtHR jurisprudence allows the development of universal standards of the vetting procedure for the countries aiming to introduce this extraordinary tool.

**Before implementing full-fledged vetting, countries should assess the potential impact of vetting on the judiciary. This assessment must consider among other things the length and complexity of the vetting process, the time needed to establish necessary vetting bodies, logistics, and development of contingency plans, thus ensuring courts are operational during the full-fledged vetting.**

50. Regarding integrity background checks, it is self-evident that any association between judges and organized crime would pose a significant threat to national security and public safety resulting in substantial damage to the reputation of

the judiciary. The Venice Commission has found it acceptable to withhold certain information during the vetting process from public disclosure if revealing it would be beneficial to the individual being evaluated.[24]

51. Regarding the right to a fair trial, the establishment of the vetting bodies must fulfill the criteria of a *tribunal established by law* in accordance with Article 6 of the ECHR. Furthermore, it is of paramount importance to ensure the rigorous process for the appointment of members of vetting bodies so that the most qualified candidates–in terms of both technical competence and moral integrity–are appointed as members of the vetting bodies. However, it should be noted that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. In the ECtHR view, such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal," but it is also crucial in terms of ensuring public confidence in the judiciary.[25]

52. Some limitations to the right of privacy of the assesses are legitimate during the vetting process. In *Xhoxhaj v. Albania and Nikehasani v. Albania*, the ECtHR considered alleged violations of Article 8 of the Convention in relation to dismissals and lifetime bans on practicing law and found that while the dismissal had severe consequences for the applicant's well-being and their family members, the interference was foreseeable and pursued legitimate aim, such as maintaining public trust in the justice system.

53. Regarding the necessity of a democratic society and pressing social need, upholding the rule of law and ensuring judicial independence are considered to serve the interests of national security and public safety. The ECtHR has affirmed that vetting judges and prosecutors is a legitimate measure to safeguard from corruption and challenges to integrity and professionalism.

## U.S. Ordinary Vetting Practices

54. Democracies around the world, especially those in Europe with robust rule of law traditions, use diverse approaches to maintain the integrity and impartiality of their judiciaries. It is important, however, to note that these methods, including Extraordinary Vetting, differ significantly from the standard vetting practices used for federal judges in the United States.

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[24] See Amicus Curiae Brief to the Constitutional Court of Albania from the Venice Commission (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e) Paragraph point 35, „The concern however remains that in certain circumstances, according to Article 39(2) concerning the background assessment, information collected as a result of the background check "shall not be disclosed if it endangers the safety of a source or is a result of a condition from a foreign government". In this case, the re-evaluation institutions may lack the possibility of independent re-evaluation and would only be able to rely on the assessment/evaluation made by the National Security Authority. Thus, the rule of prohibition of disclosure may only be possible if the information in question is favourable to the assessee. Further, from the point of view of the independence of the judiciary, the Constitutional Court could also consider the importance to ensure, during the proficiency assessment (Articles 40-44 of the Vetting Law), that the legal opinions expressed by judges and/or prosecutors, which may simply be considered as "incorrect" by the evaluators, do not become the ground for negative results."

[25] See Judgment of Besnik Cani v. Albania, Judgment, Application no. 37474/20.

55. The vetting process for U.S. federal judges involves extensive background checks and oversight by the U.S. Senate to ensure their suitability for lifetime appointments. This process is anchored in the U.S. Constitution and further shaped by federal statutes.

56. Federal judge candidates are subject to a thorough Federal Bureau of Investigation (FBI) background check. This process evaluates their reliability, trustworthiness, and overall character by examining various aspects of their lives. The investigation delves into personal details, citizenship status, marital and cohabitation history, residential history, family background, educational and employment history, military service (if any), and financial records. It also includes an assessment of mental health, involvement in civil or criminal legal matters, affiliations with different organizations, substance abuse (including drugs and alcohol), and any instances of misusing information technology.

57. Judicial candidates also undergo a vetting process by the U.S. Senate, which is responsible for giving its advice and consent before the candidate can be appointed as a federal judge. The Senate's vetting process complements the FBI's background investigation, requesting detailed information about the nominee's personal, educational, and professional background, legal practice experience, organizational memberships, speeches and publications, prior judicial positions, and financial disclosures. The Senate also invites civil society organizations, such as the American Bar Association, to provide impartial peer assessments about judicial candidates.

58. Once appointed, federal judges have ongoing reporting, periodic security checks, and disclosure obligations to ensure transparency and ethical conduct. These include annual financial disclosures, effective case management reporting, mandatory recusal from cases involving personal biases or financial interests, and adherence to the Code of Conduct for U.S. Judges. This Code emphasizes judicial integrity, impartiality, diligence, appropriate extrajudicial activities, and avoidance of political involvement. Allegations of misconduct are investigated by a judicial council or the Judicial Conference of the United States, with the potential for referral to the U.S. Congress, which has the constitutional authority to impeach and remove judges from office.

## Public Transparency and Involvement of Civil Society

59. Transparency is an essential element of vetting procedures. It serves several purposes: building confidence in the process, enabling positive public perception and support of the process, reducing the uncertainty that might be experienced by the assesses, and assuring that the procedure is in accordance with fair trial standards.

60. Another way of building credibility in the process is the involvement of representatives of civil society organizations, which may take different forms such as consultation, membership in a vetting body, or in a body set up specifically to elect the members of the vetting bodies. The selection criteria for CSOs should be merit-based and gender balance should be kept in mind.

61. Vetting laws (depending on the type of vetting) should include provisions that require the official meetings of the vetting commission, official public hearings, and evaluations to be broadcast on the respective websites or social media platforms. Ukrainian and Moldovan examples should be followed, where the Selection Commission in Ukraine maintained a Facebook page with almost 2,000 followers to provide regular updates on the work of the Selection Commission and improve communication with the public and professional community. The official YouTube channel of the Selection Commission facilitated almost 50,000 views of the posted videos (see Ukraine section, Chapter 2). In Moldova, the evaluations and hearings of the assessees for high judicial and prosecutorial councils are broadcast to the public via YouTube.

62. Civil society organizations foster inclusivity and play a significant and influential role in supporting the vetting process and promoting transparency. Their impact is seen through engagement in public consultation, policy dialogue, monitoring, and awareness raising for the citizens about the vetting.

63. Civil society organizations bring attention to the human rights implications of vetting processes. They advocate for the protection of individuals' rights, such as the right to a fair trial, due process, and protection against arbitrary decisions. This advocacy contributes to a vetting system that respects and upholds fundamental human rights principles.

64. A comprehensive communications strategy for the vetting process must be developed and elaborated to the public, and must clearly state the goals for an independent, efficient, and accountable justice system that puts citizens first.

65. The public needs to be aware of and trust the vetting reform effort itself. The communication strategy should highlight the problems and challenges identified, the solutions that it offers, and the methodology it follows. Transparency in the vetting procedure and consultation about its objectives will help in building confidence in the impartiality and effectiveness of the process.

# CHAPTER 2.
# VETTING AND LUSTRATION EXPERIENCES: A EUROPEAN OVERVIEW

## PRE-VETTING

### Ukraine

**Legal Framework.** In 2019 a new law was passed that ended the powers of all members of the High Qualification Commission of Judges (HQCJ). The HQCJ is responsible for the selection and evaluation of judges, but it has been accused of failing to conduct proper evaluations for judges, resulting in vacancies in one-third of all judicial positions. Due to this and other concerns about the integrity of the HQCJ, the decision was made to reboot the institution. To resolve the situation, the President of Ukraine, Volodymyr Zelenskyy, presented draft law No. 1008 to the new Parliament, which aimed to establish a competitive procedure for selecting members of the HQCJ, with the involvement of international experts. However, the law was insufficiently designed, and, in 2020, the Constitutional Court of Ukraine abolished key provisions, effectively blocking the establishment of the HQCJ and the proposed reforms. In 2020, the President proposed a new law to the Parliament, which suggested that the HQCJ comprise 16 members appointed by the High Council of Justice (HCJ) based on a competitive selection process conducted by an independent Selection Commission, with the involvement of international experts. During the consideration of this law, it was included in Ukraine's commitments to the European Union that the HQCJ would be rebooted through a transparent and competitive process with the *crucial participation of international experts.* This proposal was also made by G7 ambassadors in relation to judicial reform. The law was adopted, and it came into effect in 2021.

**Vetting Body.** The adopted law detailed the process for creating the first Selection Commission. This commission was to include three judges (or retired judges) proposed by the Council of Judges of Ukraine (CoJ). Additionally, there were to be three nominees from international and foreign organizations that had provided Ukraine with technical assistance for judicial reform and corruption prevention over the past five years. The CoJ reviewed seven candidates who had applied for the Selection Commission based on their quota. The CoJ then chose three national judges to be on the Selection Commission through voting. On that same day, the HCJ received a list of candidates nominated by international and foreign organizations. This list was submitted by the Office of the EU in Ukraine, the Council of Europe, the European Bank for Reconstruction and Development, the UN Development Program, as well as the embassies of Canada, Germany, the UK, and the U.S. This list included eight candidates. The Acting Chair of the HCJ appointed the first composition of the Selection Commission, which included all the judges nominated by the CoJ and three international experts.

**Methodology and Procedure.** The Selection Commission for the High Qualifications Commission of Judges of Ukraine structured its operations based on three key documents: Rules of Procedure, Methodology, and Regulation of the Competitive Selection. The Rules

of Procedure, aligned with the Law of Ukraine 'On the Judiciary and the Status of Judges,' established protocols for selecting the Chairperson and Deputy Chairperson, commission members' conduct, and the adoption of decisions. Noteworthy provisions included the "decisive vote" requirement, ensuring decisions with the support of international and foreign organizations, and the "rule of necessity" allowing recused members to participate in decisions when a quorum would otherwise be compromised. A key aspect was the decision to conduct all official meetings openly, a practice that embraced transparency and accessibility by broadcasting sessions on YouTube. This commitment to public visibility was crucial in fostering trust and accountability in the selection process. The Regulation of the Competitive Selection outlined a comprehensive procedure, including the formal check of submitted documents, background checks, candidate identification, interviews, and the final list proposed for HQCJ appointment. With an initial pool of 301 candidates, an extensive pre-vetting process led to the selection of 64 candidates for interviews and, ultimately, the appointment of 16 members to the HQCJ. In response to the challenging circumstances posed by the full-scale invasion, amendments were introduced to the Regulation. These changes allowed for both in-person and online interviews, ensuring the continuation of transparent and open proceedings. The key document shaping the competition process was the Methodology, which aligned with the legal criteria of integrity and professional competency for candidates. Under integrity, the criteria encompassed qualities such as independence, honesty, impartiality, and adherence to ethical standards. For professional competency, the focus was on legal knowledge, understanding of judicial system operations, analytical capabilities, persistent work ethic, communication skills (written and oral), and effective collaboration with colleagues. The associated indicators provided a detailed framework for evaluating candidates' professional competence.

**Transparency.** In adherence to legal provisions, the competitive process for High Qualifications Commission of Judges of Ukraine members followed the principles of the rule of law, professionalism, transparency, and political neutrality. While the law mandated broadcasting official meetings on the HCJ website, members surpassed requirements by engaging in broadcasted information sessions and webinars for candidates, resulting in a significant number of applicants, nearly 19 per position. Throughout their tenure, Selection Commission members actively communicated with the media, participating in interviews with both Ukrainian and foreign outlets. The Communications Lead effectively managed a Facebook page with nearly 2,000 followers, ensuring regular updates on the Selection Commission's activities and enhancing communication with the public and professional community. The official YouTube channel of the Selection Commission garnered almost 50,000 views for its posted videos.

**Members of the HQCJ.** The competition for the positions of members of the High Qualifications Commission of Judges of Ukraine commenced on January 21, 2022, but was temporarily suspended on February 24, 2022, due to the Russian military aggression in Ukraine. Operations resumed in 2022, with a new application period. By October 6, 2022, the list of candidates admitted to the competition was approved, and later the list of candidates admitted to the interview was formed. In 2023, the final list of candidates meeting integrity and professional competence criteria was approved. Sixty-three candidates were invited for interviews after a positive selection approach was employed. All interviews were broadcast

on YouTube, and the Selection Commission aimed for a transparent and professional assessment. On March 15, 2023, a list of 32 candidates recommended for appointment by the High Council of Justice was announced, following an extensive background check and vetting process. The positive selection principle guided the Commission in selecting the most qualified candidates for the vacant positions.

**Conclusion.** The HCJ is responsible for appointing members of the HQCJ based on recommendations from the Selection Commission after conducting interviews. The HCJ has established the details of the procedure in its own rules of procedure and methodology and also approved the schedule of interviews for HQCJ candidates. The formation of the HQCJ was hindered due to certain developments that took place in mid-May 2022. The National Anti-Corruption Bureau (NABU) had served a suspicion notice to the Chief Justice of the Supreme Court, who was an *ex officio* member of the HCJ and had participated in the interviews with the candidates. However, the Specialized Anti-Corruption Prosecutor's Office later announced that the investigation had not established any evidence of the individuals involved exercising influence on the members. The Plenum of the Supreme elected a new Chief Justice. On June 1, 2023, the HCJ appointed 16 members of the HQCJ, including eight retired judges, thus finalizing the formation of the plenipotentiary composition of the HQCJ.

**Oleksandr Volkov v. Ukraine, No. 21722/1 (European Court of Human Rights)**

The Oleksandr Volkov v Ukraine case involved the dismissal of Supreme Court Judge Mr. Volkov and the subsequent proceedings. The European Court of Human Rights (ECHR) found violations of the right to a fair trial and respect for private and family life. The ECHR criticized the lack of independence in the High Council of Justice (HCJ) due to its composition and identified personal bias and political corruption among HCJ members involved in the dismissal. Mr. Volkov was reinstated in 2015, prompting reforms in judicial discipline and careers. However, concerns about laws impacting the Supreme Court's independence persisted, leading the Committee of Ministers to urge further amendments and reviews in 2020. Ukrainian NGOs stressed the need for significant steps to improve judicial independence. The Ukrainian Government was required to report on measures taken by June 15, 2020.

## Moldova

**Background and Legal Framework.** From a legislative standpoint in Moldova, three pivotal laws govern pre-vetting and vetting procedures. On March 10, 2022, the Moldovan Parliament adopted Law No. 26/2022 (the Pre-Vetting Law), which primarily addresses measures concerning the selection of candidates for roles in the self-administration bodies of judges and prosecutors. Subsequently, in 2023, the Parliament introduced two additional laws specifically related to judicial and prosecutorial vetting. Notably, on March 30, Law No. 65, focusing on the external evaluation (vetting) of judges of the Supreme Court of Justice, was enacted. Following this, on August 22, 2023, Law No. 252./2023 on further vetting of judges and prosecutors in high-level positions, was consulted with the European

Commission and broadly aligned with Venice Commission recommendations. Each of the three laws establishes a separate Independent Commission with specific responsibilities. The first commission oversees pre-vetting proceedings for candidates of self-governing bodies of the magistracy and prosecutorial service, the second commission (created under Law No. 65) is responsible for vetting judges, including Supreme Court judges, and the third commission (established under Law No. 252) handles the vetting of prosecutors. This legislation was adopted as part of the Moldovan Government's desire to comprehensively reform the country's judicial and prosecutorial systems, acknowledging the lack of public trust in Moldova's legal system coupled with an ambition to strengthen its relations with the EU. The Republic of Moldova presented its application for EU membership on March 3, 2022, received candidate status on June 23, 2022, and began accession negotiations on December 14, 2023. Implementing comprehensive reforms of the justice system is essential for Moldova to advance towards European Union accession. Central to this reform are the Superior Council of Magistracy (SCM) and the Superior Council of Prosecutors (SCP), responsible for appointing and promoting judges and prosecutors, respectively, and the Supreme Court of Justice. Their decisions have a significant impact on the quality and integrity of the judicial system and prosecution offices.

Each Commission is composed of six members: three citizens of the Republic of Moldova and three international experts. The three national members are selected based on proportional representation, with two proposed by the majority and one by the opposition parliamentary factions. The three international members are nominated by development partners, including the U.S., the EU, and specific EU member states, notably The Netherlands. Additionally, the Commission is supported by a secretariat, primarily comprising national legal and financial analysts. As outlined in Article 3 of Law No. 26/2022, the secretariat's exclusive function is to assist the Commission in carrying out its tasks. The difference between vetting and pre-vetting is prominently evident in Moldova. The initial commission is dedicated to pre-vetting candidates for judicial self-governing bodies, while the other two commissions are specifically for vetting individuals holding positions such as judges, prosecutors, Supreme Court Judges, Attorney General, Deputy Attorneys General, presidents of appeal courts, as well as court presidents and vice presidents.

**Methodology and Decision Making.** The Pre-Vetting Commission, or the first commission, started its work in April 2022. The Commission developed and adopted its Rules of Procedure on April 22, 2022, and its Evaluation Rules on May 2, 2022. In addition, the Commission developed a five-year declaration on assets and personal interests, which candidates were obliged to complete, and an ethics questionnaire, which candidates were requested to fill in voluntarily. The Rules of Procedure consist of rules for the daily functioning of the Commission and its working methods. The Rules identify the Chairperson's responsibilities, establish protocols for using Romanian and English as working languages, and set standards for conduct. These include conflict-of-interest policies and procedures for organizing meetings, voting, and decision-making. Additionally, the Rules of Procedure detail the various stages of the evaluation process. The Commission in charge of vetting judges was appointed on June 15, 2013, while the third Commission, in charge of vetting prosecutors, was appointed on October 26, 2023. The modus operandi of both is similar to the Pre-vetting Commission. The distinction among these commissions also lies in their decision-making processes. The pre-

vetting commission renders a Decision. In contrast, the vetting commissions for judges and prosecutors produce reports as their final output. These reports are subsequently forwarded to the corresponding Council of the Magistracy and Council of Prosecutors for decision-making.

**Evaluation Procedure.** The evaluation procedure begins with candidates submitting a declaration of assets and personal interests, encompassing not only themselves but also their family members and close persons. Concurrently, the Commission initiates the process of accumulating information, exercising its extensive powers under Article 6 of Law No. 26/2022 with the accumulation of information. This includes accessing various information systems and sourcing data from both public and private institutions, such as private banks. As the Commission gathers information, it may identify areas of financial or ethical concern regarding the candidates. To address these concerns, the Commission sends one or more rounds of questions to the candidates, providing them with an opportunity to clarify issues and dispel any doubts. Following this written interaction, the Commission arranges a public hearing with each candidate. If a candidate opts out of the hearing, the Commission proceeds to make a decision based on the available written and collected information. After the public hearing, the Commission prepares a reasoned decision, typically issued within a month of the hearing. Although members of the Commission are entitled to express dissenting opinions to the decisions adopted by the majority, most decisions by the Commission have historically been unanimous.

**Evaluation Criteria and Appeal.** Article 8 of Law No. 26/2022 sets forth integrity criteria against which candidates were evaluated. To meet the ethical integrity criteria, a candidate must not have seriously violated the rules of ethics and professional conduct applicable to judges or prosecutors. This includes avoiding any actions or inactions that would appear unjustifiable to a legal professional or an impartial observer. Additionally, the candidate should be free from reasonable suspicions of having engaged in corrupt activities and must comply with the legal requirements for declaring personal assets, interests, and any conflicts of interest. For financial integrity, candidates are required to have lawfully declared their assets and ensure that their wealth accumulated over the past 15 years matches their declared income. The Commission's assessment of financial integrity encompasses several aspects. This includes verifying the candidate's adherence to tax obligations, examining the methods used to acquire assets, scrutinizing sources of income, and considering the existence of loans and donations. When it comes to an appeal, there are different proceedings for the pre-vetting and the vetting commissions. Keeping in mind that the final output of the pre-vetting commission is a decision, the decision can be appealed to the Supreme Court and can be lodged by the candidates. Candidates have the right to appeal decisions taken by the pre-vetting commission to the Supreme Court of Justice within five days. The Supreme Court of Justice has a special panel of three judges tasked with adjudicating the appeal within ten days. This special panel can either reject the appeal or accept the appeal and order a resumed evaluation of the candidate. Regarding vetting, the vetting commission compiles a report, forwarding it to the relevant Council of the Magistracy or the Prosecutorial Council. The decision made by the SCM or the SCP can be challenged either by the Independent Committee or the concerned judge or prosecutor. An exclusive panel consisting of three judges from the Supreme Court of Justice is mandated to review the appeal within 30 days. This panel

possesses the authority to either dismiss the appeal or acknowledge it, leading to a renewed assessment of the candidate.

**Conclusions.** Moldova has demonstrated a high degree of readiness in judicial matters, achieving notable advancements in the reform of its justice sector. The enactment of laws aligned with Venice Commission recommendations, particularly for the pre-vetting of candidates for the SCM and the SCP, showcases the country's commitment to judicial improvement. Initiatives such as the reform of the Supreme Court of Justice (SCJ) and the subsequent vetting of its candidates align with Venice Commission guidelines. In total, the Pre-vetting Commission has evaluated 67 candidates, consisting of judges, prosecutors, lawyers, and representatives of civil society, of which 49 were candidates for membership in the Superior Council of Judges and 18 for membership in the SCP. Publication of the Commission's decisions was contingent on the candidates' consent, leading to 26 publicly disclosed decisions. Of the 45 candidates who failed the evaluation, 15 either did not submit the necessary information or withdrew during the process. In total, 27 candidates filed an appeal against the Commission's decision. A few appeals are still pending or have been rejected. Regarding appeals, 27 candidates challenged the Commission's decisions. As of February 2024, the special panel of the SCJ had resolved 22 appeals, favoring the candidates and ordering a resumed evaluation. Thus far, the Commission has decided upon three resumed evaluations, reaffirming the candidates' non-compliance with integrity standards in each. In March and April 2023, in the eve of the vetting of the Supreme Court of Justice, 20 out of 25 sitting judges of the Supreme Court resigned. Two others resigned in August 2023, shortly after annulling and ordering a resumed evaluation in relation to 21 decisions of the Pre-vetting Commission. As of February 1, 2024, the Vetting Commission of judges issued three reports with proposal to the SCM to pass the vetting.

## Georgia

**The Venice Commission Recommendation.** Georgia, while not currently undergoing any vetting procedure, is notable for being the first country for which the Venice Commission has proposed pre-vetting (extraordinary integrity checks) for the judiciary's self-regulating bodies. This recommendation is a strategic measure aimed at addressing concerns about corruption within the judicial system. After more than two decades of ongoing judiciary reforms, in October 2023, the Venice Commission recommended that Georgia *"give due consideration to the possibility of vetting of High Council of Justice members"* to address issues of judicial corporatism and self-interest. Additionally, in November 2023, the European Commission issued a report recommending Georgian authorities *"to adapt broader reform of the judiciary, in particular, establish a system of extraordinary integrity checks with the involvement of international experts with a decisive role in the process, for candidates and persons currently appointed to all leading positions in the judiciary, in particular, the HCJ, the Supreme Court and court presidents"*.[26]

[26] European Commission for Democracy Through Law (Venice Commission). (October 2023). *Georgia: Follow-up Opinion to Previous Opinions Concerning the Organic Law on Common Courts.* (CDL-AD (2023)033 Or. Engl.). Adopted at the 136th Plenary Session, Venice, 6-7 October 2023. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)033-e

**The Problem.** From 1997 to 2004, Georgia worked on establishing an independent judiciary, marked by the adoption of the first Law on General Courts in 1997. Initially under the influence of the executive power led by the President of Georgia, the judicial system struggled with issues such as incompetence and corruption, as noted by the U.S. Department of State in 2004.[27] Reforms from 2004 to 2010 focused on making the judiciary formally independent. This included creating a judicial council for appointments and taking steps to eradicate corruption and improve judges' competence. However, reform of the judicial personnel took the form of collective responsibility without conducting any individual integrity checks.[28] As a result the period up to 2012 was criticized for its lack of balance of power, high convictions rates, and controversial criminal justice policies. The reforms continued from 2013 onward, focusing on preserving the existing system rather than a complete overhaul. The High Council of Justice's composition was changed, the powers of the Supreme Court President were reduced, and the process of appointing judges was reformed. However, the initial interest in reforming court presidents' positions waned, leading to the retention of some controversial figures. The trend of appointing judges for life became prevalent, with the reappointment of judges from the previous government without thorough evaluations. In 2019, 2020 and 2021, the Supreme Court was fully staffed which raised concerns about integrity[29], while the "Freedom in the World 2023"[30] report highlighted executive and legislative interference, lack of transparency, and professionalism concerns in the judiciary.

Furthermore, in April 2023, the U.S. Department of State publicly placed judges under visa restrictions due to corruption allegations, a matter not investigated by Georgian authorities. These recent developments underscore challenges to the rule of law and public trust in Georgia's judicial system.[31]

**Conclusion.** Throughout various reform periods in Georgia, a consistent shortcoming is evident—the absence of a robust framework for assessing the professionalism and integrity of both judicial candidates and incumbent judges. Despite some early reforms targeting the enhancement of evaluation and appointment processes, their effective implementation has been lacking. An interesting pattern observed in the historical progression of reforms is the replacement of the established judicial corps with younger legal professionals during the 2004-2010 reforms, contrasted with the 2015-2017 period in which experienced judges were retained, often through lifetime reappointments. Surprisingly, neither approach yielded significant improvements in judicial independence or public trust. In both instances, the processes for appointing or dismissing judges were not grounded in merit-based or

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27 So-called mass cleansing of judicial personnel took place between the years of 2004-2007 when terms of office of 92 out of 240 judges were terminated on various grounds. 43 judges left the office on personal statements, 22 judges were dismissed on the grounds of disciplinary violations, 11 judges were dismissed after they were found guilty of a criminal offense, and 16 judges' term of office was terminated for other various reasons. 118 new judges were appointed by the President of Georgia within the same period.

28 OSCE/ODIHR Fourth Report on the Nomination and Appointment of Supreme Court Judges in Georgia, 2021 https://www.osce.org/files/f/documents/4/b/496261.pdf

29 U.S. Department of State. (February 2004). 2003 *Country Reports on Human Rights Practices*. Bureau of Democracy, Human Rights, and Labor. https://2009-2017.state.gov/j/drl/rls/hrrpt/2003/27838.htm

30 Freedom House, Georgia: Freedom in the World 2023 report. https://freedomhouse.org/country/georgia/freedom-net/2023

31 Public Defender of Georgia. (2016). *The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia.* https://www.ombudsman.ge/res/docs/2019062409381087477.pdf

objective assessments of professionalism and, crucially, integrity. This has led to a perception that the current judicial self-governing bodies in Georgia's judiciary lack independence, further contributing to a public perception of the "clan-closed" judicial system using informal channels of influence. It underscores the critical need for reform efforts that prioritize merit-based selection and objective assessments in the appointment and retention of judicial personnel.

## SECURITY VETTING

### Croatia

**Security Checks v. Security Vetting.** In the Republic of Croatia, security checks for judges were introduced in 2010, coinciding with the creation of a specialized department within the State Prosecutor's Office for Organized Crime and Corruption (USKOK). Following this change, specialized departments were also set up in the county courts of the four largest Croatian cities to handle cases under USKOK's jurisdiction. According to amendments to the Law on Courts, judges and officials are required to pass a security check to work on these cases and must undergo a basic security check every five years, as stipulated by the Law on Security Checks.

Amendments to the Law on the State Judicial Council, adopted in 2015 mandated security checks for all candidates aspiring to become judges, including those applying for positions in the Supreme Court that are not currently serving as judicial officials. The process involves the State Judicial Council requesting a security clearance from the Security Intelligence Agency (SOA) for candidates. If the candidate does not consent to the check or if the check for the candidate reveals a security obstacle, the Council submits a request for the next candidate from the list. In 2018, the Law on the State Judicial Council was amended to require security checks for all candidates for the Supreme Court, including those already serving as judges in other courts. SOA conducts these checks under the Security Checks Act. Judges are subject to a Second- Degree security check, which involves completing a security questionnaire. This questionnaire facilitates access to public sources, official records, and data from competent security and intelligence agencies and other public authorities. It also includes examining records and personal data from legal entities, as well as interviews with the judge being vetted and other individuals, as determined necessary by the SOA.

**Security Vetting of Judges.** In 2021, the Ministry of Justice in Croatia announced proposed changes to the Law on Courts, aiming to implement security checks for all judges. Croatia requested the opinion of the Venice Commission regarding changes to the law, but while the drafting of the opinion was in progress and not completed, Croatia proceeded to adopt the proposed amendments in 2022. The rationale behind the amendments emphasized the goal of addressing the negative public perception of the Croatian judiciary as compromised and corrupt. Under the amended Law on Courts, court presidents are mandated to request the renewal of a basic security check for each judge every five years. SOA, through the Ministry of Justice, receives these requests, conducting security checks in accordance with relevant laws. The Supreme Court President receives the security check report, and a special panel of five judges from the Supreme Court, appointed by the General Session, provides the final assessment of security obstacles. The Supreme Court President informs relevant authorities

of any identified security obstacles. Additionally, amendments to the Law on State Judicial Council provide that refusing consent for a security check constitutes a disciplinary offense. It is important to note that both the Supreme Court and the Association of Croatian Judges were not involved in the drafting of these legal changes. Both the General Session of the Supreme Court and the Board of Directors of the Association of Croatian Judges opposed the amendments, arguing that they lacked a rational basis. In evaluating this process, the Venice Commission emphasized that judicial independence is integral to democratic principles.

The Venice Commission, however, expressed concerns that security vetting by an executive body could compromise judicial independence, particularly in the absence of substantial evidence of judge misconduct leading to disciplinary or criminal actions. The Commission recommended that Croatian authorities reconsider the practice of periodic security vetting and explore alternative methods for ensuring the integrity of judges, utilizing existing mechanisms.[32]

Another significant point to note is the recommendation from the European Commission's Rule of Law Report 2022 for Croatia.[33] It advises reevaluating the recent policy of conducting periodic security checks on all judges and state attorneys by the National Security Agency. The recommendation suggests ensuring their integrity through alternative existing mechanisms, in alignment with European standards for judicial independence and the autonomy of prosecutors, as well as considering the Venice Commission's opinion.

**Constitutional Court Decision.** In Constitutional Court proceedings in Croatia, the Association of Croatian Judges, the Supreme Court, and a lawyer from Zagreb, raised concerns about the constitutionality of subjecting all judges to security checks. Their objections highlighted the lack of justification and disproportionality of these checks, especially given the absence of specific suspicions and the existence of a comprehensive system already overseeing judges' conduct.[34] They also criticized the legal norms governing these security checks for their vague, imprecise, and deficient nature, particularly in terms of procedural guarantees and the undermined constitutional role of the State Judicial Council. Given these concerns, the Constitutional Court temporarily suspended the enforcement of the relevant legal provisions to prevent serious and irreparable harm. On February 7, 2023, the Constitutional Court annulled amendments to the Courts Act and the Law on State Judicial Council. The Court found these amendments to be inconsistent with the Constitution and the European Convention on Human Rights.[35] The Constitutional Court, in its evaluation of the disputed articles, considered the intended goal and the legitimacy of the social need for checking personnel in significant positions.[36] While acknowledging the

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32 European Commission for Democracy Through Law (Venice Commission). (March 2022). *Croatia: Opinion on the Introduction of the Procedure of Renewal of Security Vetting Through Amendments to the Courts Act.* Opinion No.1073/2021 CDL-AD (2022)005 Or. Engl. Adopted at the 130th Plenary Session, Venice, March 18-19, 2022. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)005-e

33 European Commission Rule of Law Report 2022, Country Chapter – Croatia, accessible at: https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en

34 Decision of the Constitutional Court of Republic of Croatia (2023). Ustavni sud Republike Hrvatske. *Odluka i Rješenje Ustavnog suda Republike Hrvatske broj: U-I-2215/2022 i dr. od 7. veljače 2023.* https://narodne-novine.nn.hr/clanci/sluzbeni/2023_02_16_289.html

35 *Ibid.*

36 *Ibid.*

legitimacy of security checks for judges, the Court emphasized the need for alignment with constitutional and Convention guarantees, especially in ensuring judges' independence and impartiality.[37] The Court criticized the legislative goal of addressing public perception through periodic security checks, deeming it of questionable legitimacy. It emphasized the lack of justification based on necessity and proportionality, finding that such a broad intrusion into fundamental rights required a more detailed and complex justification. In accordance with the Venice Commission and European Court of Human Rights practice, the Constitutional Court highlighted the necessity of precision in procedural rules governing the independence and authority of bodies responsible for assessing judges. It further emphasized that security checks on judges should be reserved for specific, factually substantiated situations of widespread corruption and distrust. The Court expressed concerns that the amendments violated the presumption of innocence and the fundamental rights of defense. It emphasized the need for a clear, detailed, and constitutionally aligned framework for security checks, addressing issues like voluntary submission, consent, data collection, and the definition of a security obstacle. The Court concluded that the amendments disrespected the constitutional position of judges, likening the situation to a system of limited judge mandates and re-elections, thus compromising judicial independence.

**Conclusions and Lessons Learned.** The Constitutional Court's decision to annul amendments to the Courts Act and the Law on State Judicial Council underscored the vital importance of aligning legislative measures, such as periodic security checks as vetting for judges, with constitutional guarantees of independence and impartiality. The ruling emphasized the need for precision in procedural rules, limited circumstances for security checks, and a clear, detailed framework respecting fundamental rights. The decision serves as a crucial reminder that legislative objectives, particularly those aimed at influencing public perception, must be diligently balanced with the principles of necessity and proportionality. It underscores the importance of safeguarding the constitutional status of judges and avoiding any measures that could potentially undermine their independence. A key takeaway from this decision is the imperative for legal reforms, especially those affecting judicial processes, to be deeply rooted in and respectful of constitutional principles, ensuring a balanced approach that upholds both public interests and fundamental rights.

## Slovakia

**Legal Framework and Background.** Standard and self-regulatory periodic verification procedures for judges in the Slovak Republic have evolved, originating from a German model and later adapting to address issues of judicial independence. The establishment of the Judicial Council in 2002 marked a significant shift, introducing legitimacy to the appointment and dismissal of judges. Constitutional amendments in 2014 and subsequent reforms in 2020 refined the regular evaluation mechanisms of judges, focusing on assessing judicial competence and introducing principles of autonomy, individuality, and non-decisiveness (to ensure that the evaluation process does not directly influence or determine the judges' decision-making in court cases, thus preserving judicial independence). The Judicial Council

[37] Damir Kontrec, Sigurnosne provjere sudaca u Republici Hrvatskoj, Fondacija Centar za javno pravo, 2022, accessible at: https://usfbih.ba/wp-content/uploads/2022/05/Damir_Kontrec-Sigurnosne_provjere_sudaca_u_RH.pdf

plays a crucial role in standard vetting judges, overseeing a comprehensive selection process involving written and oral evaluations. The 2020 reform emphasized the autonomy of the Judicial Council in evaluating evidence provided by executive authorities, ensuring individualized vetting, and leaving the final decision on judicial competence to the Supreme Administrative Court. The standard and periodic evaluation process involves investigative and evaluative stages at the Judicial Council, with judges' representation within the Council considered vital for maintaining independence and impartiality. Review commissions, as stipulated by the Judicial Council Act, are also bound by these criteria. Disciplinary proceedings determine the loss of prerequisites for judicial competence, particularly if a judge is found to have links with organized crime. The evaluation results serve as a basis for the Supreme Administrative Court's decision on disciplinary consequences. Throughout this process, adherence to principles of fairness and the right to a fair trial is paramount. The consequences of a negative evaluation, particularly the involuntary removal of judges, demand careful consideration of the entire process. Given the judiciary's classification within the civil service, it must conform to standards set by the ECtHR decision in Vilho Eskelinen and Others v. Finland,[38] which include having an independent and impartial tribunal established by law, engaging in adversarial proceedings, and ensuring legality in evidence collection. A Slovak Republic citizen eligible for a judgeship must meet criteria outlined in the Constitution and the Judges and Adjudicators Act, encompassing moral standards and integrity, with no connections to individuals involved in organized crime. Judges must continuously meet these standards throughout their tenure to preserve the independence and impartiality of judicial functions. The Judicial Council, fulfilling its constitutional duties, forms opinions on candidates' suitability, monitors judges' adherence to standards, and manages financial-related aspects. The Judicial Council Commission, comprising three members, assesses whether candidates or judges meet these prerequisites, acting on information from state authorities.

**Disciplinary Actions.** Disciplinary Actions may be initiated if doubts persist. Public authorities, except intelligence services, are obliged to provide necessary information for the Judicial Council's decisions. The Council's use of this information is restricted to preserve judicial independence, impartiality, and privacy rights. Judges facing doubts about their competence can be temporarily suspended by the Judicial Council, with specific guidelines governing the suspension's duration, salary considerations, and conditions for lifting the suspension. Serious disciplinary offenses include failing to meet office prerequisites or engaging in prohibited relationships with individuals linked to organized crime. The Judicial Council exercises *ex-lege* supervision over various categories, including candidates for judicial offices, judges transferring between courts, and those involved in the establishment of new courts. Regulations specifically address supervision related to connections with organized crime. The Judicial Council Commission may request and evaluate information from state authorities, including intelligence services, on a judge's potential organized crime links, allowing for disciplinary proceedings if necessary. The Commission evaluates obtained information, allows the judge to respond, and, if necessary, initiates disciplinary proceedings. Beyond competence prerequisites, the Judicial Council verifies the completeness of judges' financial declarations, with possible scrutiny of property increases exceeding income or

[38] Judgment of Vilho Eskelinen and Others v. Finland (Application no. 63235/00). [Grand Chamber judgment]. https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-80249%22]}

doubts about property origins. If necessary, the Judicial Council Committee can arrange for a public hearing of the judge, maintaining privacy and data protection.

**Constitutional Implication of Involvement of Intelligence Services: see the cases in Annex.**

## FULL-FLEDGED VETTING

### Albania

**Legal Framework of Vetting.** The amended Constitution[39] recognizes the vetting process as a measure to restore the proper function of the rule of law, ensure genuine judicial independence, and rebuild public trust and confidence in judicial institutions. The Parliament of Albania adopted temporary constitutional provisions related to the vetting process and Law no. 84/2016 *"On the transitional re-evaluation of judges and prosecutors in the Republic of Albania".*[40]

**The Process.** To accomplish these goals, the vetting process consists of the reevaluation of all the sitting judges and prosecutors on three grounds: assets, background (*i.e.*, inappropriate links with organized crime), and professional proficiency.

**International Monitoring Operation (IMO).** The International Monitoring Operation (IMO) was established to support the vetting process by monitoring and overseeing the entire process. The establishment of IMO aimed to strengthen transparency, reestablish public trust in the judiciary, and monitor and assist the lawfulness of process. The Venice Commission considered the establishment of the IMO in compliance with the rule of law principle as far as it has no decision-making authority. IMO consists of International Observers (IOs), who have at least 15 years of experience as judges or prosecutors in the judiciary in their own countries. They assist in the entire vetting process and are entitled to give recommendations for selecting vetting candidates, request initiation of disciplinary proceedings, and monitor the entire procedure.

**The Composition of the Vetting Body.** The bodies that conduct the vetting process are: the Independent Qualifying Commission (IQC), which consists of four permanent first instance panels having three members each; the Public Commissioner (PC), which consists of two members; and the Appeal Chamber (AC), which consists of seven judges and decide in panels of five members. They may not hold any other position or employment during their mandate. The members of the IQC and the PC have the status same as a judge at the High Court, whereas the members of the AC have the status of judges of the Constitutional Court. Their functions are incompatible with any other function that may compromise their impartiality or create a conflict of interest, ensuring the integrity of their roles, and the mandate of the IQC and the PC will expire after five years of operation (was prolonged for two more years). The mandate of the AC will cease after nine years of operation.

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[39] The full text of the Constitution that includes the temporary provisions on the vetting process can be found at the following link: https://www.gjk.gov.al/web/constitution_of_albania_1722.pdf.

[40] The full text of the Law no 84/2016 can be found at the following link: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)062-e.

**Selection Procedure of the Members of the Vetting Bodies.** Members of the vetting institutions are selected and appointed by the Parliament. The IMO has been involved in the selection of the candidates for the vetting institutions. The IMO plays a crucial role in this process by evaluating all applicants and compiling a list of those meeting the legal criteria. The Ad Hoc Committee of Parliament reviews the candidates recommended by the IMO and subsequently proposes them to Parliament, which holds the constitutional authority to make final appointments to the vetting institutions. The criteria for selecting members of the IQC, PC, and AC are as stringent as those for appointing judges. Members of these bodies are required to annually disclose their assets, which are made public. They must also declare and actively avoid any conflict-of-interest situations, as failing to do so constitutes serious disciplinary misconduct. Members of these vetting institutions are accountable under a self-governing disciplinary mechanism designed to uphold their accountability and integrity. Disciplinary procedures can be initiated by the request of another member. Investigations are conducted by a judge elected from the AC members, while a Disciplinary Commission, composed of three elected AC judges, decides on allegations of misconduct. The disciplinary measures follow the laws applicable to judges and prosecutors, ensuring a consistent and fair approach to maintaining professional standards.

**The Vetting Procedures.** The vetting process involves several key steps, starting with the submission of a *proficiency declaration*. Judges submit this declaration to the Inspectorate of the High Council of Justice, while prosecutors submit theirs to the appropriate institution within the General Prosecutor's office. The purpose of this proficiency assessment is to identify individuals who may not be fully qualified for their roles and to determine if their deficiencies can be remedied through training. Once the proficiency declaration is received, the respective assessment body—either the Inspectorate for judges or the relevant institution at the General Prosecutor's office for prosecutors—conducts the assessment. This process involves verifying the information in the declaration and evaluating the subject's proficiency. Upon completion of this review, a detailed and reasoned report is prepared and submitted to the vetting institutions.

In addition to proficiency assessment, an *asset declaration* is required, which is submitted to the High Inspectorate of Declaration and Audit of Assets and Conflict of Interests (HIDAACI). The purpose of this asset assessment is to determine if the subjects undergoing vetting have assets exceeding their legitimate income or if they have failed to accurately and fully disclose their assets and those of related persons. HIDAACI conducts an audit upon receiving the asset declaration. At the end of this audit, HIDAACI prepares a detailed and reasoned report, indicating the accuracy of the asset declaration and the legality of the financial sources of the assets. This report, too, is submitted to the vetting institutions for their decision-making process.

Individuals subject to vetting must submit a *background declaration* to the Classified Information Security Directory (CISD). This background assessment aims to identify any inappropriate contacts or associations with individuals involved in organized crime. Upon receiving the declaration, a working group is formed, consisting of members from the CISD, State Intelligence Service, and Internal Intelligence and Complaint Service. This group's task is to verify the accuracy of the information provided in the declaration and to investigate any potential links to organized crime. To conduct this assessment, the working group obtains

documents and information from various Albanian and foreign authorities. However, there are exceptions to the disclosure of certain information, particularly if it could compromise the safety of a source or if non-disclosure is required by a foreign government. Once the investigation is complete, CISD prepares a detailed and reasoned report. This report, which is made public, outlines the findings of the assessment, indicating the completeness and truthfulness of the declaration and confirming whether the individual in question has had inappropriate contacts with persons involved in organized crime. This report is then submitted to the vetting institutions for their review and decision-making process.
In the view of the Venice Commission, the bodies such as HIDAACI or CISD that participated in the vetting process primarily serve supportive and auxiliary functions aimed at helping the new institutions to carry out their mandates. Despite their involvement, the ultimate decision-making authority in the vetting process is retained by the Independent Commission and the Appeal Chamber. These bodies, as established by Albania's constitutional provisions, function as independent and impartial judicial entities. However, the role of official bodies as the Venice Commission pointed out should be understood *"in line with European standards that the evidence presented to a court of law is initially obtained by executive bodies such as the police or prosecutor. Provided its evaluation, i.e. the assessment of its veracity and the weight to be attached to it is a matter for judicial determination, this does not amount to an interference with the judicial power"*.[41] In other words, contributions of HIDAACI or CISD should be seen within the context of their supportive roles. They provide necessary information and preliminary assessments, but do not have the final say in decisions. This arrangement ensures that the core judicial power of making final determinations in the vetting process is preserved within the constitutionally-mandated independent judicial institutions.

The Independent Qualifying Commission (IQC) and the Appeal Chamber (AC) are tasked with *establishing facts and circumstances*. To do this, they may, *inter alia*, obtain legal documents, gather statements from the subject under review and the public, collect witness testimony, seek expert opinions, and conduct inspections. These bodies work in collaboration with state institutions, individuals, and legal entities, both domestic and foreign, to verify the accuracy and truthfulness of the subjects' declarations. The IOs have similar investigative authorities. During the investigation process, the subject is obliged to cooperate with vetting institutions, and their willingness to do so is considered in the decision-making process. Once the investigation concludes, the subject has the right to access their file. Afterward, the IQC invites the subject to a public hearing, in which the IOs participate. During this hearing, the subject is informed about the IQC's findings and has the opportunity to respond to inquiries posed by the IQC and IOs. If the IQC concludes that disciplinary measures are necessary, it issues a reasoned decision. This decision can either order a one-year suspension for professional training or the dismissal of the subject. Alternatively, if no disciplinary action is deemed necessary, the IQC may confirm the judge or prosecutor as suitable for their position. The subject under vetting and the Public Commissioner have the right to appeal the IQC's decision to the AC. IOs can recommend that the PC file an appeal, and if the PC chooses not to follow these recommendations, it must provide a written justification for the decision. The AC reviews the facts and can correct any procedural errors made by the IQC, taking into

[41] European Commission for Democracy Through Law (Venice Commission). (December 2016). *Albania Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-Evaluation of Judges and Prosecutors (The Vetting Law).* https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)036-e.

consideration the fundamental rights of the subject being vetted. The AC has the authority to uphold, modify, or overrule the IQC's decision, but cannot return the case to the IQC. The decision made by the IQC or AC is finalized in a closed session, with IOs present, and is publicly announced at the conclusion of the hearing. IOs have the option to attach a dissenting or concurring opinion to the final decision.

**Venice Commission's Opinions.** The Venice Commission and the Constitutional Court have evaluated Albania's vetting process, acknowledging its adherence to international and constitutional standards and aimed at fostering an independent, fair, and transparent judicial system. A full-fledged process, as a general measure applying equally to all judges, is not inherently incompatible with Article 6 of the Convention. The Venice Commission emphasized the necessity of vetting measures to combat corruption, describing them as extraordinary and strictly temporary in nature. Vetting bodies, specifically the IQC and Appeal Chamber, were recognized as possessing judicial characteristics. This recognition includes their independence, impartiality, and establishment as tribunals in accordance with law. Moreover, the Vetting Act was found to guarantee the right to a fair trial, with established procedures, transparency, and reasoned decisions. The Venice Commission justified the implementation of integrity background checks within the vetting process, viewing these checks as crucial for protecting national security interests and preventing inappropriate ties between judges and organized crime.[42]

**Decision of the Constitutional Court of Albania app. Nm.2/2017, regarding the constitutionality of the vetting process**

The Constitutional Court ruled, by majority, that the Vetting Act aligns with the Constitution, dismissing the raised grounds of the petition. The court addressed concerns about the separation of powers, emphasizing that the Constitution empowers the Independent Qualifying Commission (IQC) to conduct initial re-evaluations, allowing appeals to the Appeal Chamber linked to the Constitutional Court. The court held that the other bodies involved in vetting are auxiliary, with ultimate supervision and decision-making vested in the IQC and Appeal Chamber, ensuring their independence and impartiality.

Addressing concerns about legal certainty, the Constitutional Court underscored that all judges, including those of the Supreme Court and the Constitutional Court, and prosecutors, including the Prosecutor General, would undergo professional evaluation by the same institution. The court emphasized that an unfavorable evaluation would only occur in cases of fundamental errors or a consistent pattern of erroneous judgments, indicating a lack of professional competence. Regarding potential restrictions on fundamental rights, the court justified the interference as necessary to combat corruption and restore public trust in the justice system, aligning with national security, public order, and the protection of rights and freedoms. The court emphasized the obligation of vetting bodies to adhere to European standards and case law. Addressing concerns about the right to a fair hearing, the Constitutional Court asserted that the IQC and Appeal Chamber would be independent, impartial, and operate based on principles of lawfulness, proportionality, and fairness.

42 *Ibid.*

**Albanian Constitutional Court Decision on the Vetting Process.** During a constitutional complaint review, the Albanian Constitutional Court consulted the Venice Commission, leading to the affirmation of the independence and impartiality of vetting bodies involved in the process.[43] The IQC and Appeal Chamber were deemed to have extensive powers to independently assess evidence and make decisions in line with European standards. The Court found that the Vetting Act's provisions regarding the qualifications of members, their appointment methods, and the application of administrative procedures contribute to ensuring the independence and fairness of the vetting bodies. Moreover, the Court addressed the application of disciplinary sanctions within the vetting process. It acknowledged that while there is a presumption in favor of disciplinary actions in certain cases, this presumption is specifically confined to the context of the vetting proceedings. The process upholds principles of transparency and includes public hearings and the issuance of reasoned decisions.

## Bosnia and Herzegovina

**Legal Framework and Justification.** The initiation of the judicial vetting process in Bosnia and Herzegovina was driven by the nation's complex economic, social, and political challenges in the aftermath of the war. The judiciary faced a heavy caseload (particularly of war crimes cases), insufficient resources, and a complex organizational structure. The judicial organization in Bosnia and Herzegovina was divided into four distinct systems. Within the Federation of Bosnia and Herzegovina, there were also parallel judicial structures at the cantonal level. Inter-entity cooperation was insufficient, financing was inconsistent, and the absence of capital investments led to inadequate facilities. The legal framework allowed for the appointment of judicial officials by legislative and executive bodies, resulting in politically influenced appointments who often lacked necessary qualifications. Recognizing these challenges, the United Nations Security Council initiated the Judicial System Assessment Program (JSAP)[44] in 1998. This program was tasked with evaluating the technical, institutional, and political aspects of the judicial system. Thirteen reports generated by the JSAP underscored the urgent need for reform, particularly highlighting the judiciary's lack of independence. To address these challenges, the Independent Judicial Commission (IJC) was established in 2001 with the mandate to spearhead judicial reforms. Initially, the vetting process was conducted by domestic commissions where judges were responsible for evaluating their peers. However, this approach was found to be ineffective due to inherent subjectivity. As a result, a more comprehensive and stringent vetting method was adopted. Members of the judiciary were required to apply publicly for their positions and meet specific criteria designed to ensure transparency and objectivity in the appointment process. The primary objectives of this revised approach were to improve the quality of justice, promote judicial independence, and establish a sustainable, non-political system for appointing judicial officials.

43 *Ibid.* Paragraph 35
44 United Nations Security Council. (July 1998). *Resolution 1184(1998)*. Adopted by the Security Council at its 3909th meeting on July 16, 1998. http://unscr.com/en/resolutions/1184

**Vetting Bodies.** The IJC spearheaded a comprehensive reform initiative to bolster the judiciary's independence and efficiency in Bosnia and Herzegovina. As part of this initiative, three primary judicial bodies were formed at the state and entity levels, comprising both international and domestic members. These bodies were the High Judicial and Prosecutorial Councils, tasked with critical functions such as the selection, appointment, discipline, transfer, and removal of judges and prosecutors.

The subsequent restructuring process, orchestrated by the IJC, resulted in the closure of over 30% of first-instance courts. The optimal number of judges and prosecutors needed was then determined based on caseload, leading to a nearly 30% reduction in their numbers. The reappointment procedure aimed to improve the quality and professionalism of members of the judiciary while achieving a balanced representation in line with constitutional provisions. However, this process drew criticism, particularly from international observers, who raised concerns about potential threats to judicial independence and the possibility of political interference. The reappointment procedure was also seen as potentially conflicting with the constitutional principle of judges' irremovability. To mitigate these concerns, the Office of the Disciplinary Prosecutor was established. This office is responsible for investigating complaints against judges and prosecutors, ensuring adherence to minimum due process standards.

Amendments to the Entity Constitutions in Bosnia and Herzegovina eliminated the guarantee of life tenure for judges, initiating the reappointment process through open vacancies. The procedure involved phased applications, including comprehensive documentation and a writing sample. Although public complaints against judges and prosecutors regarding their conduct during conflict periods were taken into account, the sheer volume of such complaints hindered the possibility of conducting independent investigations, leading to some inconsistencies in the appointment decisions made by the councils. A nomination panel assessed qualifications, and after receiving recommendations, the council publicly announced its decisions. Applicants had the right to review and comment on their dossiers, ensuring transparency. Ethnic representation, as per constitutional and legal requirements, was diligently observed. Sitting judges and prosecutors who were not reappointed typically sought reconsideration. Those who ultimately were not reappointed received financial compensation. Vacancy announcements, advertising over a thousand positions, resulted in 878 being filled positions by 2004. Notably, about 30% of previously serving judges and prosecutors were not reappointed, and 18% of selected candidates were new to their roles. Only 21% of individuals who had previously served as court president or chief prosecutor were reappointed, illustrating the impact of the reappointment procedure in reshaping and balancing the national judiciary.

**High Judicial and Prosecutorial Council of Bosnia and Herzegovina.** The establishment of the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina was deemed essential to ensure uniform standards for appointing judges and prosecutors and determining their disciplinary responsibilities across the entire country. This step was not only critical for judicial consistency but also pivotal for Bosnia and Herzegovina's European Union accession process. In its Feasibility Study, the European Commission identified the creation of the HJPC as a key requirement for beginning negotiations on the Stabilization and Association

Agreement between the EU and Bosnia and Herzegovina.[45] Presently, the HJPC stands out in the regional context as a judicial council that aligns closely with the highest European standards stated in Opinion No. 10 of the Consultative Council of European Judges.[46] The competencies of the HJPC are prescribed by Article 17 of the Law on HJPC, granting it exclusive competence to appoint and determine the disciplinary responsibility of holders of judicial functions.

**Lessons Learned.** The Final Report of the HJPC covering the period of 2002-2004 provides a comprehensive analysis of the outcomes and challenges faced during general reappointment process, shedding light on crucial lessons learned.[47] During this period, the HJPC successfully filled 92% of the total 953 judicial and prosecutorial positions, marking a significant accomplishment. However, 75 positions remained unfilled, which was attributed to a perceived lack of qualified minority candidates. Notably, approximately 30% of the existing judges and prosecutors who reapplied were not reappointed, reflecting the rigorous nature of the vetting process. Furthermore, 18% of those appointed were new external candidates, indicating an infusion of new talent into the judiciary. The vetting process, while challenging, brought considerable improvements to the justice system.

However, rebuilding public trust in the judiciary continues to be an ongoing challenge. The rapid enactment of new laws as part of the Reform Agenda added complexity to the situation. The 2002-2004 vetting process in Bosnia and Herzegovina stands out as a pivotal phase in the country's post-conflict institutional and systemic reform. The report acknowledges the importance of international support in initiating and implementing these reforms. It also points out the potential issues associated with reliance on external assistance, which, despite being instrumental in the success of the vetting process, could create dependencies. This reflection underscores the delicate balance between external aid and the development of a self-sustaining judicial system.

## Serbia

**Legal Framework.** Normative grounds for the reappointment or vetting of the members of the judiciary in Serbia in 2009 were rooted in the constitutional and legislative framework. Between 2008 and 2012, Serbia aimed to reform its judiciary to enhance its efficiency and regain public trust. The constitutional basis for these extensive interventions was found in the Serbian Constitution of 2006,[48] the Constitutional Act for the Implementation of the Constitution,[49]

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45 Journal of the European Union. (June 2015). *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part.* (Document 22015A0630(01)). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22015A0630%2801%29

46 Consultative Council of European Judges. (November 2007). *Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society.* https://rm.coe.int/168074779b

47 High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Report 2004. (February 2005). https://vstv.pravosudje.ba/vstvfo/B/141/article/2155

48 Official Gazette of the Republic of Serbia. *Constitution of The Republic of Serbia*. Gazette No. 98/06. http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution

49 Official Gazette of the Republic of Serbia. *Constitutional Law of 2006 on Implementation of the Constitution of the Republic of Serbia.* Gazette No. 98/06. https://www.refworld.org/pdfid/4b56cae62.pdf

and statutes governing judicial organization. According to a European Commission report,[50] the judicial reform resulted in a 20–25% reduction in the overall number of judges and prosecutors, leading to the non-reappointment of over 800 judges out of approximately 3,000. This restructuring, effective from 2010, involved consolidating 138 municipal courts into 34 basic courts, establishing 26 higher courts, four courts of appeal, and the Supreme Court of Cassation. The prosecution service underwent parallel changes, with the creation of basic, higher, and appellate prosecution offices, alongside specialized departments for war crimes and organized crime. In addition, 2010 saw the Administrative Court become operational and the appointment of members to the Constitutional Court. Despite the constitutional emphasis on the separation of powers and judicial independence, the Constitution lacked explicit protections against executive interference in the judiciary. Article 148, paragraph 1 of the Constitution outlined conditions for terminating a judge's tenure, including relief of duty for legally prescribed reasons. The 2006 Constitution established the High Judicial Council and the State Prosecutors' Council, with appointed members chosen from judges and distinguished lawyers.[51]

Article 7 of the Constitutional Act for the Implementation of the Constitution[52] sparked significant controversy. This provision, ostensibly for changing court names, led to the collective reappointment of judiciary members, contradicting the constitutional assurance of permanent judicial positions. This approach was seen as a regression from the standards set by the 1990 Constitution. Under the 2006 Constitution, specific reasons for a judge's dismissal were not detailed, granting the legislature considerable discretion to prescribe and modify these grounds. As a result, in the reappointment process, 830 judges who were initially appointed under the 1990 Constitution were not reappointed, and some judges were appointed for the first time. The Judges' Association of Serbia contested the constitutionality of certain provisions (Articles 99–101) of the Law on Judges. They argued that these provisions, which mandated the termination of judges' offices not reappointed per the Law on Judges,[53] were contrary to constitutional guarantees. The Constitutional Court, however, rejected this challenge, with one dissenting opinion.

**Reappointment Procedure by the High Judicial Council.** The reappointment process conducted by the High Judicial Council (HJC) was primarily governed by the Decision to establish criteria and norms for assessing the competence, capacity, and worthiness for the appointment of judges and court presidents.[54] This bylaw, developed in collaboration with the Venice Commission, serves as a pivotal source of substantive law in the judges' appointment

50 European Commission. (November 2010). Commission Staff Working Document: Serbia 2010 Progress Report, 10. https://neighbourhood-enlargement.ec.europa.eu/system/files/2018-12/sr_rapport_2010_en.pdf

51 European Commission for Democracy Through Law (Venice Commission). (March 2013). *Opinion on Draft Amendments to Laws on the Judiciary of Serbia.* Opinion no. 709/2012 CDL-AD (2013)005 Or. Engl. Adopted by the Venice Commission at its 94th Plenary Session, Venice, March 8-9, 2013. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)005-e

52 Rakić-Vodinelić, V., Knežević Bojović, A., and Reljanović, M. (2012). *Judicial Reform in Serbia: 2008-2012.* Center For Advanced Legal Studies. http://ricl.iup.rs/584/1/2012%20-%20Judicial-Reform-in-Serbia-2008-2012%20-%20VRV%2C%20AKB%2C%20MR.pdf

53 Official Gazette of the Republic of Serbia. (January 2010). *Law on Judges.* No. 116/2008, 58/2009 – decision CC and 104/2009. https://arhiva.mpravde.gov.rs/images/Law%20on%20judges_180411.pdf

54 Official Gazette of the Republic of Serbia. No. 49/2009. https://www.ombudsman.org.rs/attachments/048_1-Notification%20of%20Protector%20of%20Citizens%20on%20initiation%20of%20procedure.doc

and reappointment procedures. However, instead of providing a reasoned decision based on competence, capacity, and worthiness, the HJC presented a list containing only the names, surnames, and relevant court placements of appointed judges, leaving out crucial information such as reasoning for the decision. This prompted a legal battle for those not reappointed, including one of the authors of this submission, who found herself dismissed without any explanation from the reappointing body. Subsequently, the HJC issued a collective decision, providing a general rationale for the non-reappointment of certain judges. This decision stated that the terms of these judges would end on December 31, 2009. The European Commission's 2010 Progress Report for Serbia identified numerous shortcomings in the reappointment process. These included concerns about the independence of the HJC and the State Prosecutorial Council, the lack of transparency and contradictory procedures, questions regarding the use of objective criteria, the constrained timeframe for reappointments, the inappropriate use of secret service data, and concerns over the use of personal information, such as marital status and the occupations of spouses.

When assessing the HJC's judicial appointment criteria in Serbia, the manner in which the HJC's first constitution applied these criteria remains uncertain. Experts suggest that the HJC might not have had sufficient time or, potentially, the intention to apply these criteria consistently in each case, particularly regarding qualifications.[55] When evaluating competence, the HJC, according to the Decision on criteria and standards, focused on "skills which enable efficient application of specific legal knowledge in resolving court cases." However, the Venice Commission warned against reducing this criterion to the number of closed cases and their ratio to the orientation norm. Additionally, the presumption of worthiness for incumbent judges was not clarified in the reappointment decisions, leaving candidates and the public uninformed about how the HJC defined and assessed this standard.[56]

The lack of transparency in the HJC's rejection of the presumption of worthiness was also a concern. The basis for such decisions often remained undisclosed. Anonymous letters, complaints, and unverified information were sometimes used as evidence against petitioners, resembling security check reports from security agencies.[57] The Minister of Justice revealed the use of data from the police and security agencies in deciding on judicial applications, raising concerns about the examination of judges' worthiness based on undisclosed personal data. The 2010 European Commission report raised serious concerns about judicial reforms, particularly the reappointment of judges and prosecutors. The Commission criticized the illegitimate compositions of the bodies responsible for reappointment, namely the High Judicial Council and the State Prosecutorial Council, citing transitory, incomplete, and inadequately representative compositions that deviated from European standards. The reappointment procedure lacked transparency, jeopardizing judicial independence. The

[55] European Commission for Democracy Through Law (Venice Commission). (May 2009). Comments on the Draft Criteria and Standards for the Election of Judges and Court Presidents and on the Draft Rules of Procedure on Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for Bearers of Public Prosecutor's Function of Serbia. No. 628/2009, 6. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2009)089-e

[56] *Ibid.*

[57] Blic. Malović: Pri izboru sudija korišćeni podaci policije i BIA. (December 30, 2019). http://www.blic.rs/Vesti/Drustvo/170796/Malovic-Pri-izboru-sudija-korisceni-podaci-policije-i-BIA. See also Boljević Dragana, Constitutional Court of the Republic of Serbia and Judicial Reform, 2019, Belgrade, p. 128.

councils, operating in a transitory composition, increased the risk of political influence. Objective criteria, developed with the Venice Commission, were ignored, and judges and prosecutors were neither heard nor provided with sufficient explanations for decisions. First-time candidates were appointed without interviews or merit-based assessments. The calculation of the overall number of judges and prosecutors was unreliable and adjusted post-reappointment. Non-reappointed judges‘ right to appeal was limited to the Constitutional Court, which lacked the capacity for comprehensive review.[58] Despite over 1,500 appeals, only one case was addressed, and the Constitutional Court annulled the decision on procedural grounds.[59]

**Concerns on the Vetting Process.** After the decision of the High Council of the Judiciary, judges who were not reappointed sought available legal remedies, with almost all of the non-reappointed judges (approximately 1,000) lodging Constitutional Appeals. Later, in January 2010, following the HJC's decision on December 25, 2009, a substantial number of non-reappointed judges (837 in total) — more than 630 judges — pursued a secondary legal recourse, filing an Appeal before the Constitutional Court. In June 2010, 564 personalized decisions were enacted, not voiding the previous ones from December 25, 2009, but rather "substituting" them. Two landmark decisions by the Constitutional Court in May 2010 (*Saveljic* case) and December 2010 (*Tasic* case) nullified the HJC decisions, citing a breach of the right to a fair trial for non-reappointed judges.[60]

To expedite the resolution of legal remedies for non-appointed judges, an amendment to the Judges Act was promulgated on December 29, 2010. This legislation concluded proceedings before the Constitutional Court, introduced a retroactive legal remedy, and transferred all proceedings to the permanent composition of the High Judicial Council (subsequently elected) for review. Experts scrutinized the review process, highlighting prevalent "hidden" criteria unrelated to qualifications, competence, or worthiness. The process seemed arbitrary, with hearings being transparent but ultimately holding no sway over the final decision. Numerous irregularities transpired in the non-public stages of the procedure. Domestic institutions, including the Commissioner for Information of Public Importance and Personal Data Protection, and the Ombudsman, responded to the HJC's non-compliance with orders and expressed reservations about its legality. The Constitutional Court identified a violation of the principle of equality of arms, condemning decisions founded on arbitrary applications of substantive law. It mandated the reinstatement of all non-reappointed judges, underscoring the necessity for the HJC to re-examine grounds for suspicion. The outcome was the nullification of HJC review decisions and the reinstatement of 539 non-reappointed judges by the end of 2012. Various experts and reports underscored the adverse repercussions of the judicial reform, including intimidation among judges and a deteriorated public perception of corruption in the judiciary. A substantial proportion of enrolled lawyers voiced dissatisfaction, reflecting the challenges and controversies surrounding the reform.

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58 See *supra* note 24. Paragraph 32.

59 European Commission. (November 2010). *Commission Staff Working Document: Serbia 2010 Progress Report.* SEC (2010) 1330, 10. http://europa.rs/upload/documents/key_documents/2010/Rapport%20SR%20TO%20PRESS%20CONF%2008.11.pdf

60 Judges Association of Serbia. (2015). *Snapshots of the Reappointment of Judges in Serbia.* https://www.sudije.rs/files/Snapshot_of_the_reappointment_of_judges_in_Serbia.pdf

**New Regulation Reform 2021-2023 and Lessons Learned.** Following the constitutional amendments in 2022, the National Assembly passed new laws governing the Organization of Courts, Judges, the High Judicial Council, Public Prosecution, and the High Prosecutorial Council. A key reform in these laws is the shift in the appointment of judges; they are now appointed by the High Council of the Judiciary instead of the National Assembly. Furthermore, the responsibility for managing aspects related to lay judges has been transferred from the Ministry of Justice to the High Council of the Judiciary. A noteworthy development is the inclusion of four prominent lawyers in the High Council of the Judiciary. It now comprises of six judges elected by their peers, four distinguished lawyers appointed by the National Assembly, and the President of the Supreme Court, who serves ex officio. The High Prosecutorial Council is similarly structured with 11 members, including five public prosecutors elected by their peers, four eminent lawyers elected by the parliament, and the supreme public prosecutor and justice minister serving ex officio.

Modest judicial salaries and pensions contribute to the lack of appeal in the judge profession, with Serbian judges ranking as the third lowest paid globally, earning less than 1,000 euros per month. Additionally, the existing system for evaluating judges' performance is problematic, with the system failing to recognize excellence, resulting in most judges receiving the highest grade. The judiciary is also grappling with issues like case backlogs, overwhelming caseloads, educational gaps, difficulty in monitoring progress, and a shortage of qualified judicial assistants and administrative staff. Addressing these challenges requires a multifaceted approach, taking into account social, economic, political, cultural, and professional factors. These issues and the strategies to address them are detailed in the Serbian National Judicial Reform Strategy 2020-2025.

## Kosovo[61]

**Legal Framework and Proposals.** The effort to implement a comprehensive vetting process in Kosovo's justice system is not a novel undertaking. Notably, a form of vetting occurred in Kosovo in 2010, orchestrated by the Independent Judicial and Prosecutorial Commission (IJPC).[62] Functioning as a temporary entity, the IJPC was established by the UN Special Representative of the Secretary-General within the framework of the Kosovo Judicial Council (KJC). Its purpose was to execute a one-time, exhaustive evaluation of the suitability of all applicants seeking permanent appointments as judges and prosecutors. Regardless of the linguistic nuances in constitutional provisions and legal terms, it is unequivocal that the appointments and re-appointments overseen by the IJPC align with the vetting criteria delineated in this material and endorsed by the Venice Commission.[63] In its initial phases,

[61] This designation is without prejudice to positions on status and is in line with UNSCR. 1244/1999 and the ICJ Opinion on the Kosovo Declaration on Independence.

[62] See Article 151 of the Constitution of the Republic of Kosovo. https://mapl.rks-gov.net/wp-content/uploads/2017/10/1.CONSTITUTION_OF_THE_REPUBLIC_OF_KOSOVO.pdf. See also Law No. 03/L-123. On the Temporary Composition of the Judicial Council. http://old.kuvendikosoves.org/common/docs/ligjet/2008_03-L-123_en.pdf.

[63] Organization for Security and Cooperation in Europe Mission in Kosovo. (January 2012). *Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions.* P. 14. https://www.osce.org/files/f/documents/e/8/87138.pdf

the IJPC was guided by international members, maintaining a majority even as local legal professionals, having undergone vetting, joined later. Commencing in 2009, nearly 450 incumbent judges and prosecutors were required to reapply for their positions. The vetting process was inclusive, inviting not only current judges and prosecutors but also individuals meeting the qualifications for office. A total of 898 individuals engaged in the process, undergoing a plethora of tests, some of which were eliminatory. Significantly, over 50 percent of sitting judges and prosecutors did not successfully navigate this scrutiny. Throughout its operations, the IJPC recommended the re-appointment of over 400 individuals to the KJC, leading to the eventual appointment of 343 individuals. The impetus for initiating ‚another' vetting process in Kosovo finds its official foundation in the Concept Paper on the Development of the Vetting Process in the Justice System, presented by the Ministry of Justice in October 2021. The rationale driving the necessity for a vetting reform within the judiciary is rooted in concerns about the professionalism and integrity of some incumbent judges and prosecutors. According to the concept paper, the justice system in Kosovo is susceptible to influence and vulnerabilities emanating from various interest groups, political pressures, and external factors.

**Concept Paper on Vetting.** It is crucial to highlight that the findings of the Concept Paper draw extensively from national and international reports, including those by Transparency International, the European Commission, U.S. State Department, and others. The document asserts that these findings are universally acknowledged by all involved parties, encompassing judicial and prosecution institutions, the international community in Kosovo, the government, various political entities, and members of civil society.[64] However, despite this statement in the document, there remains a lack of complete clarity on how the Ministry of Justice came to these conclusions, particularly when referencing the perspectives of the judiciary and prosecution. To tackle the issues surrounding the implementation of the vetting process, the concept paper delineates five specific options as follows:

*Option 1 – Status Quo Maintenance:* This choice involves no changes, maintaining the existing state of affairs. It implies that neither implementing nor legislative measures will be taken to address the primary problems in the justice system.

*Option 2 – Enhanced Implementation of Existing Legal Framework:* This option focuses on improving the current situation through the full and proper fulfillment of existing legal obligations. It includes the possibility of stronger budget support, with no foreseen interventions in secondary legislation.

*Option 3 – Vetting through Legislative Changes in Councils:* This option explores the prospect of developing the vetting process and building mechanisms for continuous evaluation of judges, prosecutors, and senior officials through specific legislative changes within the Judges and Prosecutorial Councils.

*Option 4 – External Vetting Body with Constitutional Amendments:* This alternative involves establishing a special vetting body through an external mechanism (ad hoc vetting) and

64 *Ibid.*

subsequent continuous checks via Constitutional amendments. This option allows flexibility in designing the vetting process by amending relevant constitutional provisions.

*Option 5 – Vetting with Constitutional Amendments and Council Oversight:* Envisaging the use of constitutional amendments, this option proposes conducting the initial vetting through an external and independent body, followed by continuous performance, integrity, and wealth checks managed within the councils.

Out of the five alternatives, the Ministry of Justice recommends implementing Option 5 (vetting with temporary constitutional changes) and Option 3 (vetting based on legislative changes). Consequently, the Ministry initially sought the Venice Commission's opinion on the Concept Paper, inviting the Commission to include draft amendments to the Constitution in its evaluation, given the preference for Option 5. The Venice Commission expressed its opinion, asserting the necessity of judicial system reform in Kosovo.[65] While it acknowledged the need for some form of effective integrity checks, the Commission believed that a substantial portion of the reform could be adopted through ordinary law. It recommended limiting vetting or integrity checks to members of the Judges and Prosecutorial Councils (KJC and KPC) who exert disciplinary power over other judicial system members, emphasizing strict proportionality in these measures. The Commission proposed legislative changes to address inefficiencies in the judicial system, advocating for strengthening asset declaration systems and vetting units within the councils. Constitutional amendments, according to the Commission, should focus on underpinning integrity checks for specific council members. In response to the Venice Commission's opinion, the KJC affirmed its stance that judges and prosecutors who had undergone sufficient checks should not undergo renewed vetting. The KJC emphasized that addressing challenges in the judicial system and enhancing judiciary performance requires well-coordinated legal initiatives and policies to strengthen internal verification, accountability, and transparency mechanisms.

**Latest Developments.** The Constitutional Court of Kosovo reviewed proposed constitutional amendments related to a temporary integrity check for certain judicial positions and the criteria for dismissing judges and prosecutors. The Court found that the amendment suggesting a temporary integrity check for members of the KJC, members of KPC, presidents of all courts and all chief prosecutors, as well as the candidates for these positions, by the Integrity Control Authority, does not violate basic rights. Additionally, two amendments establishing dismissal criteria for serious disregard of duties were deemed in line with constitutional guarantees. However, the Court found that two proposed constitutional amendments, supplementing the constitutional criterion for the dismissal of judges and prosecutors due to "serious neglect of duties", with the wording "has vulnerable integrity", diminish the fundamental rights and freedoms guaranteed by the Constitution.[66]

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65 European Commission for Democracy Through Law (Venice Commission). (June 2022). *Kosovo Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and Draft Amendments to the Constitution*. Adopted by the Venice Commission at its 131st Plenary Session (Venice, June 17-18, 2022), p. 6. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)011-e

66 Judgment in case no. KO55/23 of the Constitutional Court of Kosovo, 25 January 2024: available at: https://gjk-ks.org/wp-content/uploads/2024/01/ko_55_23_agj_ang.pdf

## LUSTRATION EXPERIENCES

### Bulgaria

**Legal Framework and Justification.** The Bulgarian experiences with lustration processes in the judiciary had controversial outcomes that eventually led to a complete rejection of such practices. Following the political changes in 1989, which marked the end of a regime undermining the rule of law in Bulgaria, efforts were made to reform the judiciary. The 1973 Constitution, still in effect at the time, lacked separation of powers and endorsed the socialist doctrine of state power unity. The need for a new constitution led to the initiation of lustration processes referred to as *"lustratsiya"* or *"cleansing"* of officials associated with the former regime. The constitutional provision for lustration lacked clear criteria for „professional merits," rendering judicial review challenging. The three-month timeframe for the Supreme Judicial Council (SJC) to make decisions and the absence of a structured procedure further complicated the process. Subsequent amendments attempted to define "professional merits" and extended the lustration period to three years. Approximately 600 judges and prosecutors underwent the quasi-lustration process, resulting in dismissals or resignations. Despite amendments being declared unconstitutional, the lustration decisions made before April 1992 remained irreversible. In 1994, a transitory provision allowed dismissed individuals to appeal, but only a few were successful. The negative experiences with judicial lustration made it a taboo topic in official debates. While attempts at the lustration of former Communist National Security agents were made, they faced legal and constitutional challenges. The controversial ban on former State Security agents in the Executive was declared unconstitutional. The divisive nature of lustration efforts, coupled with concerns about political abuse, has hindered further initiatives. In 2006, a new law addressed the affiliation of Bulgarian citizens with State Security, including judges and attorneys. In 2021, a proposed law suggested a 10-year dismissal for individuals proven to have cooperated with the former State Security, covering sectors like national security, defense, law enforcement, and the judiciary. However, the draft law was not adopted.

**Alternatives to Lustration.** In light of the challenges and controversies surrounding lustration, the Bulgarian judiciary has explored alternative methods to address potential corruption and power abuses among judges. A primary concern has been the tendency for certain groups of judges to secure promotions and retain key leadership roles within the judicial system.[67] To counteract this issue, the Bulgarian legislature enacted an amendment in 2003 to Article 129 of the Constitution, adding a new section 6. This amendment sets a limit on the tenure of court presidents, restricting them to a maximum of two terms. Additionally, various proposals have been made to limit the duration or terms of certain judges in influential positions. However, these proposals have not been implemented to date. The aim of these measures is to prevent the consolidation of power within a small group of judges and to promote greater fairness and integrity in the judicial system.

[67] The creation of a so-called judiciary *nomenklatura* has been commented on in many articles in the media and interviews, including: https://www.svobodnaevropa.bg/a/31921345.html; https://www.standartnews.com/balgariya-obshtestvo/sazdavaneto_na_sadebna_nomenklatura_e_opasno-264501.html; https://faktor.bg/bg/articles/sadiya-otgledahme-si-sadebna-nomenklatura-koyato-dnes-prechi-na-ozdravitelnite-protsesi-v-sistemata

**Conclusions.** The vetting experiences within the Bulgarian judiciary have proven to be significantly challenging and have not yielded the intended results. The absence of clear criteria, procedures, and expectations regarding the course of action following the identification of judiciary members underscores the considerable risks associated with implementing such procedures. Additionally, if the administrative bodies responsible for vetting lack independence and professionalism, there is a compelling argument for reconsidering the approach to addressing this delicate matter without infringing the standards for judicial independence. Presently, conducting vetting within the country's judiciary seems unfeasible given the prevailing political circumstances and the stance of professional ethics. This underscores the urgent need to explore alternative methods for ensuring the quality and integrity of the judiciary.

## Poland

**Justification.** Following the collapse of communism in Poland, the issue of individuals in public office, including judges, cooperating with security services emerged. This led to an extensive political discourse on how to account for such cooperation, resulting in the enactment of various, often sporadic, laws. The most significant amendments to these laws, along with Constitutional Court rulings declaring certain measures unconstitutional, are presented chronologically in this publication. The circumstances surrounding the enactment of these laws, the motives for introducing specific amendments, and the government's stance on lustration are also covered. During the communist era, the attitudes of judges in Poland towards communism varied. In 1980, discussions aimed at increasing the independence of the judiciary emerged, influenced by Solidarity trade unionists' demands. Martial law imposed in December 1981 interrupted these discussions. Judges and prosecutors, particularly in the Supreme Court, were among the most partisan professional groups during the communist period.[68] In 1982, during martial law, a significant majority of judges appointed to the Supreme Court belonged to the ruling party. The decline of the communist regime became evident in 1989, with "roundtable" talks leading to the establishment of the national parliament after the elections in June 1989, which led to the formation of a democratic government. The early democratic government adopted a "thick line" policy, focusing on strengthening democracy rather than holding public officials accountable for their communist past. The "roundtable" compromise played a role in this policy, as lustration demands were not part of the initial negotiations. The National Council of the Judiciary was established to ensure judicial independence. The government did not introduce its lustration bill, and the one proposed by the Christian National Union was not passed. However, the principle of "amnesty—yes, amnesia—no" was adopted, emphasizing forgiveness without forgetting. The government believed this strategy would cleanse the circles of power without hindering decommunization efforts. In 1990, the Security Service was abolished, and the Office of State Protection was established. Some measures resembling lustration were attempted but did not garner

[68] Stanowska, M. *Attitudes of Judges and Prosecutors in the Political Trials of the 1980*, p. 223-257, in Strzembosz, A., and Stanowska, M. (2005), Warsaw judges in time of trial 1981-1988. See also Niewiński, K. (2016) *The People's Republic of Poland and the Judiciary, 1980-1985: Attempts to Stop the Solidarity Revolution*, p.161-200 and p.237. See also Dudek, A. *Tadeusz Mazowiecki's Government and the Justice Reform*, Journals of Church Social Thought 22/2018, p. 119.

parliamentary support. Amendments to the 1991 electoral law, allowing public disclosure of candidates‘ cooperation with security services, were unsuccessful.

**Legal Framework.** The Resolution of the Sejm of 1992 emphasized the need to “settle accounts for future guilt”. The objective of lustration was to expose collaborators of the Security Services currently occupying high-ranking positions in the legislative, executive, and judicial branches and to establish mechanisms for scrutinizing future public office candidates. Efforts were made to legislate lustration during this period. However, the growing need for a legally binding mechanism to address lustration led to renewed parliamentary discussions. In 1992, the Sejm passed a “lustration resolution” with an overwhelming majority, mandating the Minister of Internal Affairs disclose information within two months on state officials, senators, parliamentarians, judges, and lawyers who collaborated with the Security Services between 1945 and 1992. This Resolution was declared non-compliant with various constitutional articles, leading to its suspension on the same day and its repeal. Legislative work on the lustration law involved simultaneous consideration of five draft bills, culminating in the passing of the Lustration Act on April 11, 1997, nearly eight years after the fall of communism. The Lustration Act outlined the entities subject to lustration, the procedural steps, and the legal consequences of providing false statements. It focused on persons performing public functions, including judges and prosecutors, with the obligation to submit statements limited to the period of work or service in the state security authorities or collaboration with them from July 22, 1944, to May 10, 1990.

**The Lustration Act of 1998.** The amendment, effective from November 27, 1998, designated the Court of Appeals in Warsaw as the Lustration Court to facilitate its establishment. Notably, attorneys were included in the expanded list of persons subject to lustration, and the Public Interest Ombudsman‘s term was extended to six years. The amendment also allowed interested parties to initiate lustration proceedings in specific situations. Article 18a (4) of the Act empowered the court to initiate proceedings at the request of a person coerced into cooperation with state security authorities. The definition of a lustration statement shifted from „false“ to “untrue,” emphasizing objective truthfulness over intent. The consequences of providing an untruthful statement included the loss of a position or function requiring special qualifications, excluding judges under disciplinary jurisdiction.

The Lustration Court was established on November 27, 1998, and started functioning on January 1, 1999. Constitutional challenges were addressed by the Constitutional Court in 1998, which affirmed the constitutionality of most provisions. The concept of “cooperation” with security services was clarified, emphasizing conscious, secret, and operational engagement. The provision allowing the resumption of lustration proceedings to the detriment of a person without specifying a time limit was found unconstitutional. However, the Lustration Law faced challenges in fulfilling its role, with significant delays and procedural issues.

The Institute of National Remembrance (IPN) and the Commission for the Prosecution of Crimes against the Polish Nation, established on December 18, 1998, were complementary to the Lustration Law. The IPN regulated the recording and processing of documents, including

those of state security organs. The IPN Law was later amended in response to the disclosure of the Wildstein List, addressing concerns about access to personal data. The Lustration Law of October 18, 2006, replaced the 1997 Lustration Act, introducing a new catalog of persons in public functions, including judges. The law outlined a procedure for issuing certificates by the IPN, impacting moral qualifications for public office. A person against whom a certificate was issued could challenge it through a civil action, but sanctions for untruthful statements were limited to ethical assessments for specific positions. The law abolished the Public Interest Ombudsman and the Lustration Court, introducing judicial verification of issued certificates through separate court proceedings.[69]

**Lustration Criteria and Bodies—Public Interest Ombudsman and Lustration Court.** The key lustration criterion introduced was cooperation with security authorities, defined as conscious and secret collaboration with operational or investigative cells. Lustration statements were verified by the Public Interest Ombudsman, an independent body, and the Lustration Court, a special division of the Court of Appeal in Warsaw. The procedure ensured the protection of personal data and offered procedural guarantees comparable to criminal trials. The Lustration Court issued rulings based on the truthfulness of statements, with the possibility of resuming proceedings under specific conditions. Lustration was based on individual liability, focusing on making false statements rather than past collaboration. A final decision stating a false statement resulted in the loss of moral qualifications necessary for public office, with a ten-year ban on holding certain positions. The Act allowed horizontal appeals, with decisions rendered by the Lustration Court subject to appeal and cassation. Despite certain provisions deviating from democratic fair trial standards, the Act aimed to ensure transparency and procedural safeguards in the lustration process.

The Constitutional Court, **in its ruling on May 11, 2007**, addressed appeals against the new lustration law, finding it incompatible based on 77 objections from the applicants. The court outlined essential conditions for a lustration law compatible with the rule of law, emphasizing its role in eliminating threats to sustainable democracy. Key conditions included preventing lustration from being punitive and restricting its application to specific public positions. The court stressed that lustration should not target private or semi-private organizations unless certain positions within these organizations pose a risk to human rights or the democratic process.[70] It advocated for a reasonable time limit on the ban on holding office, recognizing the potential for positive changes in an individual's attitudes over time. The ruling highlighted that lustration aims primarily to protect democratic mechanisms, with punitive objectives considered secondary. It criticized the rigidity of penalties for false lustration statements, particularly for judges, emphasizing the need for flexibility in disciplinary measures. The Constitutional Court also declared unconstitutional the provision defining cooperation with security authorities. The court affirmed that cooperation should involve conscious, clandestine, and operational actions, not just a declaration of intent. As a result of the judgment, the lustration law underwent an amendment on September 7, 2007. Changes

69 Act of March 4, 2005. *On amending the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation* (Journal of Laws of 2005, No. 64, item 567). https://www.legal-tools.org/doc/fc69d7/pdf/

70 Constitutional Court ruling of November 10, 1998 (K 39/97). https://trybunal.gov.pl/fileadmin/content/omowienia/K_2_07_GB.pdf

included introducing a new model lustration statement and flexible penalties for making false statements. The court, when confirming a false statement, could rule on the deprivation of passive voting rights and impose a ban on holding public office for a specified period, ranging from 3 to 10 years.

**Amendment to the Law of February 14, 2007**, amending the Act on Disclosure of Information on Documents of State Security Agencies from 1944-1990 and the Content of such Documents, as well as the Act on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws of 2007, No. 25, item 162), came into effect on February 28, 2007. This amendment introduced hybrid solutions, reinstating the lustration as defined by the 1997 law while significantly modifying the lustration procedure.

*Catalog of persons subject to lustration:* The obligation to submit lustration statements was reinstated, abandoning certificates issued by the IPN. Article 4 of the Act outlined a broad catalog of persons required to submit a statement, extending the obligation to include bailiffs, tax advisors, academics, and members of certain state-owned companies. Similar to the 1997 law, lustration statements were required at the time of agreeing to candidacy or accepting positions (Article 7, paragraph 2). The obligation also extended to individuals seeking public office, including judges born before August 1, 1972, concerning their work or cooperation with state security organs from July 22, 1944, to July 31, 1990 (Article 7, paragraph 1).

*Lustration criterion:* Cooperation with security organs became a lustration criterion, with a statutory definition introduced in Article 3a of the Act. Cooperation was defined as conscious and secret collaboration with state security authorities, either as a secret informant or an assistant in acquiring operational information.

*Lustration proceedings:* The responsibility for assessing the truthfulness of lustration statements fell on the prosecutors of the Lustration Bureau of the Institute of National Remembrance, aiming to expedite proceedings. The assessment procedure changed: initially involving prosecutors, it was updated to district courts using criminal procedure provisions when appropriate (Article 17). According to Article 20, lustration proceedings were initiated upon request or ex officio by the prosecutor of the Lustration Bureau or a branch lustration office. Appeals against district court decisions were subject to higher court review, eliminating horizontal instances in lustration appeals. Lustration proceedings could be reopened under specific circumstances. Article 21b allowed cassation to the Supreme Court within one year of a ruling becoming final, initiated by the Minister of Justice or, at the request of the person subject to lustration, by the Commissioner for Human Rights. The cassation could be based on gross violations of the law that significantly impacted the ruling‘s content, resulting in gross injustice.

*Special regulations for the lustration of judges:* Lustration proceedings against judges were governed by general provisions of the Lustration Law, while specific regulations outlined disciplinary regulations, excluding ordinary disciplinary proceedings and extending proceedings to retired judges. The Law of December 1997 introduced amendments, allowing disciplinary responsibility for retired judges and reducing the age of retirement. The law also

accelerated the retirement age for judges, introduced special measures for judges involved in communist political trials, and added measures for judges who made false lustration statements. It took effect on January 26, 1999, with a three-year limit for initiating disciplinary proceedings. Despite the efforts, none of the 30 cases submitted during the first period resulted in a finding of guilt.

**Lessons Learned.** The Institute of National Remembrance has processed approximately 500,000 lustration statements over its 15-year operation, with more than 2,000 motions for lustration proceedings and approximately 11,000 witness interviews. During the lustration law period, 1,577 final court rulings deemed lustration statements untrue. Individuals providing false statements, including five individuals in judicial and prosecutorial roles, faced deprivation of public functions and a 3 to 10-year ban on holding such positions. Despite expectations, lustration, especially concerning judges, has not achieved the desired impact on public opinion. More than three decades after the fall of communism, there are ongoing discussions, often led by right-leaning political figures, about the need to further reform the judiciary by addressing the remnants of the communist era. Further, the concept of "violation of the principle of independence" by judges is essentially equated with a "judicial crime," covering actions such as bending the law, unjustified deprivation of liberty, and limiting parties' rights or the right to appeal. Lustration efforts targeting Polish judges after the political transformation in 1989 involved multiple uncoordinated tools, including indictments by the Main Commission for the Investigation of Crimes against the Polish Nation, the 1997 Act disclosing work or service in state security organs, the 1998 Act on disciplinary liability of judges, the 1998 amendment allowing withdrawal of retired judge status, and the 1990 amendment ending terms for existing Supreme Court judges. The conclusion is drawn that lustration efforts primarily targeted judges at the Supreme Court level and did not extend uniformly across the entire judiciary. Arguments against lustration, particularly in common courts, emphasize concerns about the demand for the dismissal of judges in 1981, the inquisitorial nature of the verification process, and the Polish justice system's inability to replace negatively vetted judges. The inconsistency in lustration practices has been leveraged by some political figures, potentially challenging the autonomy of independent courts. The public nature of the lustration process can inadvertently affect the perceived integrity of the judiciary, creating a situation where public perception may impact judicial proceedings.

## Czech Republic

**Justification.** The situation in the Czech judiciary is stable and there are currently no ongoing vetting or lustration processes in the Czech Republic. A historical context is needed to outline the lustration process in the judiciary in the Czech Republic (and formerly Czechoslovakia) and provide a comparison with the current vetting processes in some Central and Eastern European countries: In November 1989, Czechia went through a regime change, the so-called Velvet Revolution, which brought an end to 40 years of communist government and established a democratic regime. Under the communist regime, similar to other nations in the communist bloc, governance was centralized under the dictatorship of the Communist Party. This authority was bolstered by a substantial membership base. For instance, in Czechoslovakia, with a population of about 14 million at the time, the Party had

approximately 1.5 million members. These members, generally loyal to the regime, occupied all key positions across various sectors –including the economic realm, state administration, and, notably, the judiciary. Within the judiciary during the communist era, many positions were held by members of the Communist Party. Among these individuals, some actively endorsed the regime's policies, and a number were involved in politically manipulated trials. However, many professionals within the judiciary personally did not support the communist regime, and, despite the constraints of the regime, they endeavored to deliver the fairest and most equitable judgments possible under the circumstances.

The judges who were not actively pro-regime invariably did not preside over high-profile political trials. As a general practice, political trials against dissidents were judged by the presidents of the courts or their deputies, according to a pre-arranged scenario. One significant factor impacting judicial independence was the limited term of judicial appointments, set at ten years. Upon completion of this term, judges required reconfirmation to continue in their roles, which introduced a level of existential uncertainty and pressured them to align with the regime's expectations. In the transition to democracy, it was crucial to ensure that key positions in state and public bodies, particularly those related to state security, were occupied by individuals committed to democratic principles. This shift aimed to replace those who had held influential roles under the previous regime with individuals whose loyalty to the new democratic framework could be anticipated.

**Legal Framework.** Act No. 451/1991 was established to set the criteria for occupying certain positions within the bodies and organizations of the Czech and Slovak Federal Republic. Additionally, Act No. 279/1992, serving a similar purpose, was applied to roles in the Police and Armed Forces. These acts specifically applied to executive and high-ranking positions and were not applicable to ordinary employees. They were initially set for a five-year period, ending on December 31, 1996, under the assumption that this timeframe would be adequate for stabilizing the societal structure post-regime change.

Under these laws, a significant reshuffling of positions occurred. Individuals seeking to retain their positions were required to obtain what was known as a negative lustration certificate from the Ministry of the Interior. Conversely, if issued a positive lustration certificate, individuals had the option to challenge it in court, a practice that was fairly common. Remarkably, only about 2% of the certificates issued were positive. Criteria for disqualification from certain important positions, including judges, included involvement or cooperation with state security, membership in the People's Militia, holding significant roles in the Communist Party, or studying at a political university in the Soviet Union. However, membership in the Communist Party was not alone deemed sufficient for a negative lustration certificate.

These laws have been repeatedly criticized by the Council of Europe, the European Parliament, and civil society organizations, as, from their perspective, they were a violation of human rights. The legality of the lustration law was examined by the Constitutional Court, which concluded that its adoption complied with the Constitution according to the situation in the state and society at that time. In 1992, the Constitutional Court recognized that the interests of society and the State in the replacement of persons in certain publicly

important positions and in the application of measures to avoid the risk of subversion or a possible recurrence of totalitarianism took priority over the fundamental right of citizens to have access on equal terms to elected and other public offices or the right to pursue an occupation or profession without discrimination. Similar legislation, which focused on the status or behavior of individuals during totalitarianism and deducing negative consequences for them in terms of their participation in the public life of a democratic state, was adopted in other post-communist countries (Germany 1991, Bulgaria 1992, Hungary 1994, Albania 1995, Poland 1997, and Romania 1999).

The legislature and judiciary in the post-communist transition faced two primary challenges: (1) revising the legal system to remove laws incompatible with the new constitutional order; and (2) reforming the judiciary in terms of its personnel. In terms of judicial reform, as previously mentioned, the lustration law focused on addressing issues such as collaboration with state security and active political involvement in the previous regime.

At the end of 1991, the Czech National Council passed Act No.335/91 Coll., titled "On Courts and Judges." This Act included a crucial provision in Section 67, allowing for the submission of petitions to dismiss judges by the deadline of 31 December 1993. This provision applied to judges who, between 25 February 1948 and 31 December 1989, had violated their duties of independent judgment or had unjustifiably interfered with the courts' independent and impartial decision-making. This law and the previously mentioned Lustration Act No. 451/1991 Coll. set the stage for a significant personnel shift in the judiciary. Judges who were appointed before January 1, 1990, were required to be reconfirmed and reappointed by the then Czech National Council, with a deadline set for August 31, 1992. Additionally, the legislation removed the limitation on a judge's mandate. However, this reappointment process was not without its challenges. It was somewhat cursory in nature, as those responsible for deciding on judges' lifetime nominations were constrained by time and lacked comprehensive documentation. This situation posed challenges to the effective implementation of the law and to ensuring the integrity of the judicial reappointment process. As a result, the impact of this judicial reappointment process in the early stages of the new democracy was somewhat limited. Recognizing that a sudden and complete removal of all professionals associated with the Communist Party could destabilize the nascent democratic system, the emphasis was placed more on the expertise of individual judges rather than solely on their past affiliations. It was acknowledged that many individuals had joined the Communist Party out of necessity, as membership was often a prerequisite for professional advancement. To ensure a smooth transition to a democratic judiciary, the focus was on removing those who had significantly compromised themselves during the normalization process. This particularly pertained to judges who had fundamentally abdicated their position during the totalitarian period, especially those involved in political trials.

In the 1990s, a relatively large number of judges voluntarily left the judiciary. Some did so due to the recognition that their past actions under the previous regime made their continued service untenable, while others were influenced by unsatisfactory renumeration. Part of the public viewed these changes as insufficient. Those who had been persecuted for political reasons during the communist era were particularly vocal in their dissatisfaction,

expressing concern that some members of the Communist Party and other individuals deemed compromised remained in judicial positions. In 1992, the Committee for the Defence of the Unjustly Prosecuted (VONS) raised concerns to the Minister of Justice regarding the permanent reappointment of judges who had served during the totalitarian regime. VONS attached a list of 42 judges, nominated for lifetime appointments, who had previously issued unconditional prison sentences to political dissenters, violating fundamental human rights. Eventually, an agreement was reached wherein the Minister of Justice committed to initiating disciplinary proceedings against six of these judges by the end of 1993. However, these disciplinary actions did not yield results. In 2011, based on the Constitutional Court's ruling,[71] the Ministry of Justice published a list of judges who had been members of the Communist Party during the previous regime, stating that this release was justified on the grounds that the public had a right to this information, which could be pertinent in assessing a judge's impartiality. By 2011, 20 years after the fall of communism, 618 out of 3,000 judges in the system were former members of the Communist Party. This situation highlighted the complex legacy and ongoing challenges of transitioning from a totalitarian regime to a democratic judicial system.

**Lessons Learned.** The issue of the professional tenure of judges under the previous regime is no longer relevant. Thirty-four years after the revolution, the majority of judges from that era have retired or are nearing retirement, meaning the current judiciary is predominantly composed of individuals without ties to the communist past. Yet, instances still arise where a judge's past can impact their professional trajectory. This indicates that even decades after the revolution, historical factors continue to exert some influence on the functioning of the judiciary.

[71] Decision of the Constitutional Court, Czech Republic I. ÚS 517/10. https://www.usoud.cz/en/decisions

# ANNEX

## APPLICABLE JURISPRUDENCE

### European Court of Human Rights – Vetting Cases

#### Xhoxhaj v. Albania

This case validated the legality and proportionality of the vetting process, emphasizing its disciplinary nature, adherence to legal principles, and necessity in addressing corruption and restoring public trust in the Albanian justice system. The ECtHR issued its first judgment on Albania‘s vetting process and emphasized several key points in its analysis. The disciplinary nature of the vetting proceedings was highlighted, governed by the Vetting Act and relevant administrative laws. Notably, the process excluded references to criminal law or procedure, being conducted by the Independent Qualification Commission (IQC) and subject to appeal at the Appeal Chamber, without involvement from criminal authorities. The ECtHR acknowledged that the vetting provisions targeted specific professional categories—judges, prosecutors, and legal advisors—with a focus on safeguarding professional conduct, honor, and public trust, emphasizing the purely disciplinary nature of the process. Regarding the severity of penalties, the ECtHR noted that the applicant‘s dismissal, a characteristic of disciplinary offenses, distinguished it from criminal penalties. The court highlighted that the prohibition on rejoining the justice system post-dismissal was not inherently a criminal sanction. The ECtHR affirmed the applicant‘s access to court, citing the constitutional and legislative basis for the establishment of vetting bodies, including the IQC and Appeal Chamber, ensuring a legitimate tribunal for the re-evaluation process. The independence and impartiality of vetting bodies were examined. The ECHR found the applicant failed to demonstrate undue influence on the IQC by the executive. The non-renewable five-year term for IQC members and the absence of serving judges aimed at preventing conflicts of interest were considered in the context of the vetting process‘s extraordinary nature. The court determined that the vetting proceedings, distinct from ordinary disciplinary proceedings, were initiated without a complaint, with the IQC focusing on re-evaluating constitutional and statutory criteria rather than acting as a prosecutor. Compliance with fairness standards in proceedings was emphasized, with both the IQC and Appeal Chamber exercising full jurisdiction and providing adequate reasons for their decisions, meeting Article 6 § 1 requirements. The ECtHR noted the IQC‘s public hearing during proceedings and recognized the importance of considering the special features of asset audit processes in the principle of legal certainty. The dismissal‘s impact on the applicant‘s private life, as well as the finding of undermining public trust, were deemed foreseeable and not violating Article 8 § 2 of the Convention. The interference in the applicant‘s private life was deemed necessary in a democratic society, responding to a pressing social need to combat corruption and reform the justice system. The Appeal Chamber‘s reassessment of financial and professional competence, along with cumulative findings, justified the proportionality of the applicant‘s dismissal. Regarding the alleged violation of Article 13, the ECHR concluded that the dismissal of the applicant‘s appeal did not render it an ineffective remedy, considering the Appeal Chamber‘s full jurisdiction over questions of fact and law.

## Nikëhasani v. Albania

Unlike the case *"Xhoxhaj v. Albania"*, the IQC only pursued and completed the preliminary investigation concerning the evaluation of assets and subsequently decided on the merits of the case on that basis, without delving into the integrity background check and evaluation of professional competence. That was consistent with the Vetting Act and in the ECHR's view, that approach did not entail, *per se*, a violation of the applicant's right to a fair trial. Furthermore, the ECHR found no reason to depart from its relevant findings in *"Xhoxhaj v. Albania"* according to the alleged violations of Article 6. The ECtHR did not consider that the interference under Article 8 of the Convention[72] was not "per the law" on account of the circumstances mentioned in that complaint. The ECtHR concluded that the interference with the applicant's right to respect for private life was in accordance with the law, as required by Article 8 § 2 of the Convention, pursuing a legitimate aim, as it has concluded previously in the case *"Xhoxhaj v. Albania"*. The ECtHR noted that certain failures by public officials to comply with obligations related to asset declarations can be generally considered serious and these may include, among other things, failures to declare major assets or sources of income or deliberate attempts to conceal them from the authorities. The ECtHR has also recognized in this regard that it may be legitimate to take into account the income and declarations of the official's spouse, partner, or other member of the immediate family in assessing the official's compliance with anti-corruption laws, emphasizing that at the same time, not every minor instance of non-compliance with asset declaration regimes, or insignificant discrepancy between spending and lawful resources, should trigger the most serious disciplinary sanctions, such as dismissal from office. Turning to the present case, the ECtHR noted that, having started the investigation for all three criteria and having completed the part for the wealth criterion, the IQC had regard to the probative value of the evidence gathered, and decided to limit the assessment to that criterion and shift the burden of proof to the applicant. ECtHR assessed that, in accordance with the Vetting Act, the applicant was required to prove the underlying lawful sources used for the acquisition. The vetting bodies concluded that no conclusive evidence had been adduced that was contemporaneous to the period when the money had allegedly been received and used to acquire certain assets and the domestic decisions were not arbitrary or manifestly unreasonable in that regard. In reasoning so, the ECtHR concluded that the findings of the SAC, as the final instance in the vetting proceedings, in respect of the evaluation of assets described above and taken cumulatively, were sufficiently serious to raise substantial doubts about the applicant's financial propriety and justify her dismissal from office and that the applicant's dismissal from her post as a prosecutor was proportionate under Article 8 § 2 of the Convention, with similar reasoning as in the case *"Xhoxhaj v. Albania"*.[73]

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[72] The applicant alleged a violation of Article 8, contending that the Vetting Act lacked clarity and foreseeability. She argued that the broad and ambiguous terms of the Act failed to define circumstances leading to dismissal from office, leaving it unclear what level of discrepancy or shortcoming justified such action. The applicant claimed that the vetting bodies possessed unchecked discretion in interpreting and applying provisions, resulting in an open-ended decision-making process. The absence of guidelines, she said, compromised legal certainty. The alleged violations pertained to both the vetting proceedings and her subsequent dismissal from office, as well as the purported ban on practicing law as a private lawyer post-dismissal, as implied by relevant legislation.

[73] European Court of Human Rights. *Nikëhasani v. Albania.* Application No. 58997/18, Third Section. Date of decision December 13, 2022, which became final on May 22, 2023. https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-221479%22]}

## Besnik Cani v. Albania

Given the importance of the rule aimed at upholding the legitimacy of and public trust in the vetting process, the ECtHR reasoned that it seems obvious that the appointment of a person who does not meet the statutory criteria for a certain judicial office is capable of undermining the legitimacy of the judicial function in question because the importance of the statutory eligibility criteria for the judges.[74] The ECtHR added that, as far as vetting proceedings are concerned, the SAC is the highest tribunal in the country and accordingly, the appointment to the SAC of a candidate who had been previously dismissed from an office for a breach of the law and for incompetence is difficult to reconcile with the requirement that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. The ECtHR recalled that it fell to the domestic authorities to employ all the means available to them to ensure that judges of the SAC fulfilled the statutory requirements for their position. The ECtHR concluded that there was an arguable claim of a manifest breach of a fundamental rule of domestic law that had adversely affected the appointment of L.D. as a SAC judge. In the light of the foregoing, and in particular of the failure of the national courts to properly consider the relevant Convention questions raised by the applicant, the ECtHR concluded that there had been a violation of Article 6 § 1 of the Convention because L.D. sat on the SAC bench that examined the applicant's case. The ECtHR reiterated that the finding of a violation of the right to a tribunal established by law in the present case may not in itself be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that have since become res judicata under domestic law. Turning to the individual measures, the ECtHR noted at the outset that the vetting proceedings in respect of the applicant concerned primarily his rights and obligations as a career prosecutor and did not have any implications for, at least directly, the rights and obligations of any third parties. Furthermore, the outcome of those proceedings, which resulted in his immediate dismissal and the statutory imposition of a lifetime ban on his returning to the post of magistrate, had serious consequences for his professional career. The ECtHR reasoned that accordingly, given the circumstances of the present case and to the extent that it might be possible under domestic law, the most appropriate form of redress for the violation of the applicant's right to a *"tribunal established by law"* under Article 6 § 1 of the Convention would be to reopen the proceedings, should the applicant request such reopening, and to re-examine the case in a manner that is keeping with all the requirements of Article 6 § 1 of the Convention.[75]

## Sevdari v. Albania

In this case, the ECtHR addressed alleged violations of Article 8, emphasizing that, for vetting purposes, income is considered lawful only if properly declared and taxed. It found the legal

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[74] The applicant, a former prosecutor, claimed a violation of Article 6 § 1, arguing the Special Appeal Chamber (SAC) that dismissed him was unlawfully established. He filed a complaint against an SAC judge for document falsification, leading to the judge's suspension and dismissal. In the applicant's case, the SAC, including the accused judge, overturned the Independent Qualification Commission's decision, citing inaccuracies in his asset declaration and a conflict of interest. The panel voted three to dismiss, including the accused judge, and two to uphold the IQC's decision.

[75] European Court of Human Rights. *Besnik Cani v. Albania*. Ap. 37474/20, Third Section. Date of decision October 4, 2022, which became final on January 4, 2023. https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-219773%22]}

provisions justifying the applicant‘s dismissal met the foreseeability requirement, making the decision „in accordance with the law.“ Regarding legitimate aims, the ECtHR saw the dismissal as pursuing objectives aligned with protecting national security, public safety, and others‘ rights. The European Convention of Human Rights (ECHR) provides that the state may impose restrictions of these rights only if such restrictions are „necessary in a democratic society and proportional to the legitimate aims enumerated in each article” – the Court in this case considered the limited disciplinary sanctions outlined by the Constitution and the Vetting Act were in accordance with the Convention. Despite the absence of a detailed scale of sanctions, the ECtHR reasoned that, given the exceptional circumstances preceding the Vetting Act, a more limited scale aligns with the vetting process‘s spirit. The ECtHR acknowledged potential tax evasion‘s seriousness but highlighted the relatively small percentage of unproven taxed spousal income. It noted the absence of irregularities in domestic income over several years. While emphasizing the prosecutor‘s responsibility to prove compliance with tax laws, the ECHR suggested that a less severe form of disciplinary action, outside vetting, could have been considered. Ultimately, the ECHR found the applicant‘s dismissal disproportionate, considering her inability to prove her husband‘s tax payments over two decades, and no evidence of bad faith or deliberate violations. Despite Albania‘s violation of Article 8, the ECHR didn‘t identify systemic issues in the vetting process. It didn‘t suggest general measures but indicated that, in cases of breaches, reopening domestic proceedings might be the appropriate remedy, allowing the applicant a potential legal avenue to seek redress. The ECHR recommended reopening the proceedings in a manner consistent with Article 8 requirements.

## Thanza v. Albania

This case reflects the ECHR‘s nuanced evaluation of the vetting process components, with particular emphasis on fairness in the burden of proof, the adequacy of opportunities for the applicant to challenge findings, and the proportionality of the vetting bodies‘ approach in the context of Article 8 of the Convention. This case involved a thorough analysis by the European Court of Human Rights (ECHR) regarding various aspects of the vetting process and alleged violations under the European Convention on Human Rights. Regarding the f*inancial Assessment*, The ECtHR acknowledged the reasonableness of the vetting bodies‘ estimation of essential living expenses, supporting the Independent Qualification Commission‘s (IQC) methodology. However, the ECHR criticized the IQC for imposing an excessive burden of proof on the applicant concerning alleged inappropriate contacts with individuals tied to organized crime. This imbalance in the burden of proof led the ECHR to conclude that the fairness requirement outlined in Article 6 § 1 of the Convention was not met in this context. Regarding the *Background Assessment*, concerns were raised about the SAC‘s (Supreme Appeal Chamber) reasoning and its failure to adequately provide the applicant with an opportunity to challenge findings related to the background assessment. The ECtHR pointed out deficiencies, emphasizing the importance of a thorough, evidence-based approach and criticizing the SAC‘s excessively formalistic stance. The ECtHR concluded that the vetting bodies‘ approach to the background assessment did not comply with the fairness requirement of Article 6 § 1 of the Convention. Concerning the *assets assessment*, the ECtHR found no violation of Article 8 § 2 concerning inaccurate asset

declarations. The dismissal of the applicant was deemed justified based on the grounds of an unfavorable assets and financial integrity assessment. Notably, concerns were raised about the non-declaration of a garage. Despite this, the ECHR considered the vetting bodies' approach proportionate to the legitimate aims under Article 8 of the Convention.

## Decisions of the Constitutional Court of Slovakia

**Ruling Case No I. ÚS 396/2016 of 21 November 2019—Failure to meet the prerequisites for judicial competence (candidate for the post of judge)**

In the opinion of the Constitutional Court, the procedure of the Judicial Council and the contested decision could not have violated the complainant's right of access to public office on equal terms under Article 30(4) of the Constitution or the right to judicial and other legal protection under Article 46(1) of the Constitution or the right under Article 25(1) (c) of the Covenant, even if the contested decision is brief and not further reasoned, since it was possible to perceive and ascertain from the course of the Judicial Council session itself, the questions put to the candidate during his public hearing, the possible reactions of the members of the Judicial Council or from the material submitted what was the specific reason why the candidate was not elected by the Judicial Council, or which information found out about the candidate was perceived by the Judicial Council to be problematic for the candidate's eventual performance of his duties as a judge. The applicant, as a candidate for appointment as a judge, participated in the proceedings (decision-making) before the Judicial Council on the prerequisites for judicial competence, was given the opportunity to comment on the findings resulting from the documents provided by the National Security Authority and the Judicial Council itself, to answer questions and to put questions to the members of the Judicial Council (i.e. to debate), there is no doubt (the applicant does not object) that an audio recording was made and minutes were taken which, in addition to the attendance, the agenda of the Judicial Council session and the content of the resolutions adopted, also show the content, the proceedings and the outcome of the vote on that item on the agenda of the Judicial Council meeting.

**Ruling of the Constitutional Court of the Slovak Republic Case No. II ÚS 164/2017 of 7 July 2020—Failure to meet the prerequisites for judicial competence (candidate for the post of judge)**

By decision of the selection board, the applicant was declared one of the successful candidates to fill three vacancies for judges in the district court. By the order challenged in the complaint, the Judicial Council, on the basis of the documents submitted by the National Security Authority, decided in a secret ballot that the applicant did not satisfy the conditions of judicial competence, which guarantee that she will perform the duties of a judge properly. The mere fact that a body votes, even by secret ballot, cannot be sufficient to determine whether or not its decisions are to be reasoned, nor can it in itself determine the scope of the grounds on which that body may eventually base its decision. The constitutional and statutory limits of the appointing authority's powers and its status determine how it makes its decisions. The constitutional complaint was rejected.

**Ruling of the Constitutional Court of the Slovak Republic Case No I. ÚS 293/2017 of 22 June 2021—Failure to meet the prerequisites for judicial competence (candidate for the post of judge)**

The applicant participated in a selection process for a judicial position, where she secured the top position. However, based on information from the National Security Authority, the Judicial Council determined that she did not meet the required judicial competence conditions. The Judicial Council's decision, made by secret ballot, had seven members in favor, six abstaining, and none against. The applicant, unaware of the National Security Authority's assessment, argued that she had no chance to address the concerns. Nevertheless, she actively participated in the Judicial Council proceedings, answering questions regarding the provided documents. The Constitutional Court rejected her objection that the decision lacked reasoning, emphasizing the different legal treatment of candidates and appointed judges.

The court underscored that the Judicial Council, not acting as a judicial body, followed procedures outlined in the Judicial Council Act. The law required giving the candidate an opportunity to respond to the National Security Authority's findings, and the applicant did not allege a breach of this obligation. The court dismissed the claim that the principles of equality of arms and *audi alteram partem* should apply, asserting that the law governed the roles of the Judicial Council and the National Security Authority in a manner that did not necessitate equal positions or opposition in decision-making. The court emphasized the public interest in protecting the office of a judge, emphasizing the distinction between evaluating candidates and assessing the ongoing competence of appointed judges.

**Judgment of the Constitutional Court of the Slovak Republic, Case No. IV ÚS 621/2018 of 7 October 2021—Failure to meet the prerequisites for judicial competence (candidate for the post of judge). Attendance of a National Security Authority officer at a session of the Judicial Council, questioning the candidate.**

The Constitutional Court concluded that the Judicial Council's practices, despite referencing constitutional and legislative provisions, resulted in an unbalanced and unequal treatment of the applicant during the judicial candidate hearing. The Court found that the process was tainted by the Judicial Council's actions, which created unequal conditions for the applicant. Notably, the minutes and audio recording were prepared by the National Security Authority staff, the candidate was questioned by a National Security Authority representative, and the meeting was held at the National Security Authority premises.

The Constitutional Court expressed concerns about the objectivity of the proceedings, emphasizing that the involvement of the National Security Authority in the questioning process and the location of the meeting had a significant impact. It criticized the lack of evaluation or explanation of the reasons for the unsuitability, considering the Judicial Council's procedure constitutionally unsustainable. The Court stated that the Judicial Council failed to ensure the objectivity of its decision-making, violating the applicant's fundamental rights and failing to meet the minimum standards for non-arbitrary decision-making.

**Ruling of the Constitutional Court of the Slovak Republic, Case No. IV ÚS 224/2020 of 6 October 2021—Unacceptable interference by a National Security Authority officer in the voting of the Judicial Council.**

The applicant contended that her exclusion from the judicial competence evaluation was unclear, suggesting a potential link to her partner‘s political views. She argued that neither the National Security Authority nor the Judicial Council presented specific allegations, causing significant disruptions in her personal and professional life. Despite the lack of clarity on the reasons, the Constitutional Court upheld the complaint.

The court emphasized the need for clear rules and procedures in the Judicial Council‘s assessment to ensure fair treatment. It raised concerns about the National Security Authority‘s involvement, highlighting its impact on the entire meeting, including the secret ballot, and questioned the necessity of the National Security Authority staff‘s presence after the complainant left. The court noted the absence of reasons justifying this involvement and the uncertainty regarding compliance with the 15-day period for Judicial Council members to review the National Security Authority‘s documents. According to the Constitutional Court, the extension of the National Security Authority‘s role to the decision-making phase deviated from the constitutional and statutory framework of the Judicial Council‘s competencies.

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