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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ALBANIA

DRAFT LAW

**FOR THE AMENDMENT OF THE CONSTITUTION
TO PROVIDE FOR THE EXTENSION OF THE TERM OF OFFICE OF
THE TRANSITIONAL BODIES IN CHARGE OF THE RE-EVALUATION
OF JUDGES AND PROSECUTORS**

AND EXPLANATORY NOTE

**REPUBLIC OF ALBANIA
ASSEMBLY**

DRAFT

N. ____ / 2021

**FOR AN AMENDMENT TO LAW NO. 8417, DATED 21.10.1998, "THE CONSTITUTION OF
THE REPUBLIC OF ALBANIA", AS AMENDED**

Pursuant to Articles 83, point 1, and 177, point 1, of the Constitution, upon the proposal of one fifth of the members of the Assembly,

ASSEMBLY

OF THE REPUBLIC OF ALBANIA

DECIDED:

In law no. 8417, dated 21.10.1998, "The Constitution of the Republic of Albania", as amended, it is amended as follows:

Article 1

In article 179 / b, point 8, in the first sentence, the words "...is 5 years from the date of their functioning..." are replaced with the words "terminates in 31.12.2024"

Article 2

Entry into force

This law enters into force 15 days after its publication in the Official Gazette.

SPEAKER

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**REPUBLIC OF ALBANIA
PARLIAMENT**

PARLIAMENTARY GROUP OF THE SOCIALIST PARTY

EXPLANATORY REPORT

ON

DRAFT LAW

**“FOR AN AMENDMENT TO LAW NO. 8417, DATED 21.10.1998, "CONSTITUTION OF THE
REPUBLIC OF ALBANIA", AS AMENDED**

I. PURPOSE OF THE DRAFT LAW AND THE REASONING OF THE LEGAL INITIATIVE

i) Purpose

This draft law is an initiative of Parliament Members, representing Socialist Party pursuant to article 177/1 of the Constitution of the Republic of Albania aiming to propose a solution to successfully complete the process of transitional vetting of judges and prosecutors for the implementation of the Justice Reform.

The initiative is aimed at fulfilling one of the goals of the Justice Reform is to create a body of judges and prosecutors with high ethical, moral and professional integrity, to guarantee the independence of the justice system as well as to restore public confidence in the institutions of the this system.

In drafting this initiative, are taken into consideration the principles and provisions summarized in the Justice Reform Strategy¹, the will of the legislator in the constitutional changes of 2016, as well as the recommendations of the Venice Commission in its Opinions² issued relevant for the Justice Reform process and the process of re-evaluation of judges and prosecutors.

ii) The process of re-evaluation of judges and prosecutors (vetting process)

The process of re-evaluation of judges and prosecutors or as it is widely known as the vetting process, is one of the pillars of the Judicial Reform provided for in the constitutional and legal provisions; it is an extraordinary and transitional measure, but necessary for independence and efficiency of justice. Vetting is an essential element to guarantee a visible level of integrity of magistrates, which establishes the basis to restore public confidence in the justice activity.

In 2016, the Albanian Parliament approved a series of constitutional amendments that paved the way for a comprehensive justice reform. The Constitutional Amendments affected one third of the Constitution and radically redesigned the Albanian justice system.

¹ <https://rm.coe.int/strategjia-ne-refomen-e-sistemit-te-drejtises/16809eb53a>; Ad Hoc Commission Decision on the Justice Reform no. 96/2014, dated 27.11.2014.

² Interim opinion 21.12.2015; Final Opinion 14.03.2016; Opinion 19.06.2020

The constitutional changes, followed by the adoption of laws implementing the Constitution, consist of a complete restructuring of the judicial and prosecutorial system that strengthens the independence and efficiency of the judiciary and prosecution, provide for: accountability mechanisms, avoidance of political influence in justice institutions, unblocking mechanisms for the appointment of judges and prosecutors; and innovative solutions related to the re-evaluation of all incumbent judges and prosecutors..

Judicial reform is currently in the implementation phase and the challenges ahead are in terms of its consolidation and increasing the efficiency of the courts and the independence of magistrates in the judiciary and prosecution.

In addition to the institutional restructuring of the judiciary and prosecution, the reform process provided the start of the vetting process, as a process of verifying all judges and prosecutors on the professionalism, integrity and assets created over the years of their careers in the justice system. This process has cross-party support, is carried out by independent authorities, is subject to international monitoring and its compliance with the European Convention on Human Rights has been confirmed by the Venice Commission. An International Monitoring Operation has been set up to oversee the process during its implementation.

The Strategy for the Reform of the Justice System, point VI. Anti-Corruption Measures, Objective 2, envisaged as one of the steps to be taken: Drafting the necessary constitutional and legal changes, in a transitional manner, which provide for the establishment of a qualified, independent and impartial, ad hoc mechanism, which be charged with the task of re-evaluating the professional knowledge, moral, ethical and psychological integrity of judges and prosecutors, combined with a special verification of their assets where the burden of proof is upon the vetting subjects, offering all the necessary procedural guarantees such as: i) a vetting process with clear criteria; ii) a vetting process that is individual and transparent; iii) a vetting process carried out by a professional, independent and impartial body; iv) a reevaluation process that guarantees the possibility to appeal to a structure with the same characteristics as the structure in charge of the reevaluation; v) a process that is consistent with all other guarantees articulated by the Opinion of the Venice Commission on Ukraine; and vi) with the assistance and direct control of the process by international agencies that monitor and assist the justice system in our country.

The draft constitutional amendments envisaged that the re-evaluation be carried out by the Independent Qualification Commission (IQC), while the appeals of the vetting subjects or the Public Commissioner (PC) be reviewed by the Special Appeal Chamber at the Constitutional Court (CA) for a term of 9 year limited time. So the 9-year mandate was initially provided for the three vetting bodies.

Venice Commission in opinion³CDL-AD (2016) 009 on draft constitutional amendments, prior to their adoption by the Parliament, , advised that the vetting process needs to be carried out on the condition that it be considered an "extraordinary and temporary measure" and suggested reducing the duration of the mandate for the vetting bodies. Following the recommendation of the Venice Commission, the mandate for the ICQ and PC was reduced to 5 years. However, the mandate of the CA was not changed, so it remained 9 years.

On this basis with the constitutional amendments of 2016⁴, in the Constitution in Article 179/b⁵, which provided for the entire system of re-evaluation of judges and prosecutors and other vetting

³ CDL-AD(2016)009 English 14/03/2016 - Public

Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

⁴ Law no. 76/2016 "On some additions and changes to law no. 8417, dated 21.10.1998, the Constitution of the Republic of Albania, as amended

⁵ Article 179/b:

subjects supplemented by the Annex to the Constitution, determines that the mandate of ICQ and PC is 5 years from the date of their functioning, while the mandate of CA is 9 years.

In the same constitutional provision it was foreseen that: "After the dissolution of the commission, the unfinished cases of re-evaluation are reviewed by the High Judicial Council, according to the law. Unfinished issues of re-evaluation of prosecutors are reviewed by the High Council of the Prosecution, according to the law. Following the dissolution of the public commissioners, their competencies are exercised by the Head of the Special Prosecution. Appeals against the decisions of the commission, which are still unfinished, will be reviewed by the Constitutional Court."

Based on the constitutional provisions, the Assembly approved the Law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", (Vetting Law) where Article 70 provides that: *"Termination of re-evaluation institutions 1.Re-evaluation institutions cease to function according to Article 179 / b, point 9, of the Constitution. 2. Except as otherwise authorized by the Assembly, the sole term of office shall be that of the Secretary-General, who shall have sufficient staff to carry out his duties.*

iii) Progress of the transitional vetting process of judges and prosecutors

The transitional vetting bodies of magistrates are considered to have started functioning on 17 June 2017⁶. In accordance with Article 179/b of the Constitution, the 5-year term of the ICQ and PC expires on 17 June 2022.

1.The re-evaluation system is established in order to guarantee the proper functioning of the rule of law, the independence of the justice system, as well as to re-establish the public trust and confidence in the institutions of this system.

2. The re-evaluation is carried out on the basis of the principles of fair trial, as well as by respecting the fundamental rights of the assessee.

3. All judges, including judges of the Constitutional Court and the High Court, all prosecutors, including the Prosecutor General, the Chief Inspector and the other inspectors of the High Council of Justice, shall be subjects of re-evaluation ex officio.

4. All legal advisors of the Constitutional Court and High Court, legal assistants of the administrative courts, legal assistants of the General Prosecution Office shall be re-evaluated ex officio. Former judges or prosecutors, and former legal advisors of the Constitutional Court and High Court, with at least three years of work experience in this function, may undergo upon their request the re-evaluation process, if they fulfil the criteria as per the law.

5. The re-evaluation is conducted by an Independent Qualification Commission, while appeals of the assesseees or the Public Commissioners are adjudicated by the Appeal Chamber attached to the Constitutional Court. During the transition period of 9 years, the Constitutional Court shall consist of two chambers.

6. The Commission and the Appeal Chamber are independent and impartial.

7. Failure to successfully pass the re-evaluation process constitutes a ground for the immediate termination of the exercise of functions, in addition to the grounds provided for in the Constitution. Judges and prosecutors, including those seconded in other positions, former judges or former prosecutors, who successfully pass the re-evaluation, remain in office or are appointed judges and prosecutors. All other assesseees, who successfully pass the re-evaluation, are appointed as judges or prosecutors, as per the law.

8. The mandate of members of the Independent Qualification Commission and the Public Commissioner is 5 years from the date of commencement of their operation, while the mandate of the judges of the Appeal Chamber is 9 years. After the dissolution of the Commission, pending reevaluation cases are conducted by the High Judicial Council, in accordance with the law. Pending reevaluation cases of the prosecutors are conducted by the High Prosecutorial Council, in accordance with the law. After the dissolution of the Public Commissioners, their competences are exercised by the Chief Special Prosecutor of the Special Prosecution Office. Any appeals against pending decisions of the Commission are considered by the Constitutional Court.

9. The Assembly decides on repealing this Annex after the last re-evaluation decision becomes final, following a report submitted by the Chairperson of the Appeal Chamber on the situation with the pending cases or at the end of the mandate of the Special Qualification Chamber.

10. Procedures and criteria for the re-evaluation are regulated as per the provisions of the Annex and the law.

⁶ Assembly Decision no. 82, dated 17.06.2017

The vetting institutions started functioning in June 2017, but the first vetting processes in ICQ started in February 2018. This is due to the approval of internal regulatory acts, organization of the work procedures, and staff recruitment in new institutions established from the start. The transfer of duties from the former High Council of Justice and the General Prosecution to the High Judicial Council and the High Prosecution Council brought delays in time regarding the preparation of professional reports of the vetting subjects, which are part of the review during the vetting process.

About 800 magistrates and legal assistants are currently undergoing the vetting process which began in February 2018. These are data of 2020 and do not include the vetting subjects who have resigned or have reached retirement age.

From the available data, until July 2021 it results that ICQ completed the vetting process for 421 subjects. By June 2022, 71 reassessment processes are expected to be completed. At the end of the 5-year mandate, it results that ICQ should have carried out a total of about 500 vetting cases and a total of about 300 other cases will remain uncompleted. These uncompleted processes according to the constitutional provisions will be passed for review to the High Judicial Council for Judges and the High Prosecution Council for Prosecutors.

The vetting process was interrupted for 4 months during the pandemic period and slowed down for about a year (2020). Based on the projections that take into account the average time for a vetting process in the ICQ; the challenges related to the complexity of vetting cases; the dependence that exists in receiving answers from other institutions, other reasons related to full functionality (resignation, illness, disciplinary proceedings, etc.) it turns out that the conclusion of all cases by the current vetting bodies (ICQ and PC) requires, at least two more years beyond their 5-year constitutional mandate (June 2024), but in the most positive scenario until 31.12.2024.

At the end of the current 5 year constitutional mandate of ICQ and PC, it results according to the data that about 1/3 of the total vetting cases are likely to remain unresolved in ICQ.

iv) Problems encountered

Following the above analysis it results that at the end of the 5 year mandate of ICQ will remain unfinished about 1/3 of the total vetting cases.

One of the core issues that affected the fulfillment of tasks by the vetting bodies ICQ and PC within the deadline set in the Constitution is undoubtedly the pandemic COVID-2019 that had a direct impact on the activity of the Commission, as in any other sector, causing serious delays. For 4 months the activity was stopped, while for about a year the functions slowed down.

One of the biggest difficulties during the pandemic was the lack of logistical infrastructure, the lack of electronic equipment (laptop) for each counselor, which slowed down the work, even though ICQ continued with the online activity. In addition, access to and analysis of classified documents could only be carried out physically near premises designated by law. Another difficulty has been the failure of state institutions to respond in a timely manner to ICQ requests for various reasons during the pandemic.

Whereas, the beginning of the vetting process 8 months after the functioning of ICQ and PC depends on several factors, such as: drafting and approval of internal regulatory acts, the organization of work methods, the recruitment of staff in new institutions that were set up from the start. The vetting process is *sui generis*, therefore, gaining experience and familiarity with this process took a considerable but necessary time to consolidate the administrative investigation procedures and guarantee due process.

The transfer of duties from the former bodies of the High Council of Justice and the General Prosecutor's Office to the High Judicial Council and the High Prosecution Council brought timely delays regarding the preparation of professional reports of vetting subjects, which are part of the review process.

v) Summary of reasons for proposing the initiative

Given the high number of cases that are supposed to remain unresolved by the ICQ at the end of the 5-year constitutional mandate, the most optimal solution is considered the proposal for the extension of the mandate of the ICQ and PC until 31.12.2024, for the following reasons:

1. The default constitutional scenario (continuation of cases left by the Councils - High Judicial Council, High Prosecution Council) carries the risk that the Councils will need approximately one year to establish their own internal rules and procedures and to build the capacity to take on these tasks, while having other many important tasks to perform in the management of courts and prosecutor's offices during the transition, while the vetting/vetting process is ongoing. Therefore, it risks further delaying the verification process and hindering the Councils in their functioning. Forecasts based on the results produced so far show that verification by ICQ could be completed by December 2024 (most positive scenario). Thus according to such projections the reevaluation process in ICQ is forecasted to be completed in 2024, and considering the time needed for Councils to establish the regulatory basis, relevant structures and mode of operation to carry out the vetting process, the Councils would need 3 and a half years to complete this process. So the deadline in such a case would be longer than the deadline that ICQ and PC need to complete the vetting process according to the forecasts above. Having said that, the extension of the mandate of the ICQ and PC according to the proposal of the legal initiative would be in line with the recommendations of the Venice Commission in the opinion CDL-AD (2016) 009 in the current situation; while the continuation of cases by the Councils would fall in contradiction with this opinion as the deadline for completion of the process is longer than the proposed intervention.
2. The legislature had foreseen that few cases, mainly cases related to legal advisers, would remain to be concluded by the Councils, thus with a low risk of corporatism and conflict of interest. This is why the Vetting Law provides that members of vetting bodies could not have been magistrates in the last 2 years prior to their appointment to these positions. The Councils, meanwhile, will have to deal with a significant number of cases for vetting subjects who are judges and prosecutors.
3. Council members and SPAK lack relevant experience in the vetting process and will need to familiarize themselves with this process to consolidate administrative investigation procedures and ensure a fair legal process. Under these conditions, there is a risk of inconsistencies, i.e. different standards for different assessments. On the other hand, there is a risk that the Councils will find themselves in a situation of conflict of interest as they have to ensure the functioning of courts/ prosecutors as a primary and essential function and at the same time maintain a high standard of re-evaluation in the vetting process.

The above can also affect the creation of prejudices in public perception.

4. Human rights guarantees confirmed by the ECtHR for vetting bodies⁷ have not yet been fully confirmed by the ECtHR for the Councils.

⁷ ECtHR's Decision A.Xhoxhaj vs Albania

5. During the drafting of the initial scenario that envisages the competence of the Councils for some remaining cases of vetting, the legislator had assumed that the Councils would be able to decide on panels composed by 3-members. The relevant provision of the Constitution that allows this, was interpreted by the Constitutional Court in its Decision no.41, dated 28.03.2017. The court ruled in this decision that "*all powers provided by the Constitution (Articles 147 / a, and 149 / a) ... cannot be delegated to committees*". In conclusion, "*The Court reiterates that the permanent and temporary commissions are supporting bodies under the Councils and as such they cannot exercise the attributes expressly provided for in the Constitution for the latter.*" Following this interpretation, the Councils have established standing and *ad hoc* Committees, which prepare the decision, however the decision-making body is in any case the plenary session of the Councils.

II. EXPLANATORY SUMMARY OF THE CONTENT OF THE DRAFT LAW

The draft law consists of 2 articles.

Article 1 provides for a change in the content of the first sentence of point 8 of Article 179/b of the Constitution which provides for the mandate of the ICQ and PC. The mandate for ICQ and PC which according to the constitutional provision results to end on June 17, 2022, with the amendment proposed through the legal initiative is extended until 31.12.2024.

Article 1 has the following content:

"In article 179/b, point 8, the first sentence, the phrase " ... is 5 years from the date of commencement of their operation " is replaced with the phrase " ends on 31.12.2024 " .

Article 2 provides for the entry into force of the law, 15 days after its publication in the Official Gazette.

III. INSTITUTIONS AND BODIES CHARGED OF THE IMPLEMENTATION OF THE DRAFT LAW

The transitional vetting bodies of judges and prosecutors, the Independent Verification Commission and the Public Commissioners are in charge of the implementation of this draft law.

IV. DRAFT LAW DRAWING

This draft law was drafted by a group of Socialist Party deputies. The process of reviewing the legal initiative requires the assistance of the expertise of international partners United States of America and the European Union that have supported Albania in the process of Justice Reform and its implementation.