



# REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

vol. 4 | n. 3 | setembro/dezembro 2017 | ISSN 2359-5639 | Periodicidade quadrimestral

Curitiba | Núcleo de Investigações Constitucionais da UFPR | [www.ninc.com.br](http://www.ninc.com.br)



## Constitutional reform in Brazil: lessons from Albania?

### *Reforma constitucional no Brasil: lições da Albânia?*

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**Recebido/Received:** 07.08.2017 / August 7<sup>th</sup>, 2017

**Aprovado/Approved:** 20.08.2017 / August 20<sup>th</sup>, 2017

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Como citar esse artigo/*How to cite this article*: ALBERT, Richard; BENVINDO, Juliano Zaiden; RADO, Klodian; ZHILLA, Fabian. Constitutional reform in Brazil: lessons from Albania? **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 3, p. 11-34, set./dez. 2017. DOI: 10.5380/rinc.v4i3.54372.

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**Abstract**

Corruption is a fact of public life in Brazil. Since the country's transition to democracy, corruption has been a challenge for each presidential administration. The Brazilian judiciary has not escaped the corrupting influences in the region. One country whose challenges with judicial corruption are arguably even greater than Brazil's is Albania, a country for which we were appointed to act as Consultants to the Special Parliamentary Committee on the Reform of the Judicial System responsible for introducing major constitutional reforms aimed at curbing judicial corruption. Those reforms to the Albanian Constitution entered into force in 2016. Too little time has elapsed since then to evaluate whether these reforms will fulfill their purposes. And certainly much too little time has passed for us to know whether the reforms in Albania can be applied with any confidence elsewhere in the world where similar problems with judicial corruption continue to undermine democratic norms of transparency and accountability, namely in Brazil. We nonetheless believe it is useful to explain the Albanian constitutional reforms and to introduce them to readers in Brazil as available options for combating judicial corruption.

**Keywords:** Constitutional reform; Albania; Brazil; Judiciary; corruption.

**Resumo**

*A corrupção é um fato da vida pública no Brasil. Desde a transição do país para a democracia, a corrupção tem sido um desafio para cada administração presidencial. O Judiciário brasileiro não escapou das influências corruptoras da região. Um país cujos desafios com a corrupção judicial são sem dúvida ainda maiores do que o Brasil é a Albânia, um país pelo qual fomos nomeados para atuar como Consultores da Comissão Parlamentar Especial sobre a Reforma do Sistema Judicial responsável pela introdução de grandes reformas constitucionais destinadas a travar a corrupção judicial. Essas reformas à Constituição albanesa entraram em vigor em 2016. Pouco tempo se passou desde então para avaliar se essas reformas atenderão aos seus propósitos. E certamente muito pouco tempo passou para que possamos saber se as reformas na Albânia podem ser aplicadas com alguma confiança em outros lugares do mundo, onde problemas similares com a corrupção judicial continuam a prejudicar as normas democráticas de transparência e responsabilidade, nomeadamente no Brasil. No entanto, acreditamos que seja útil explicar as reformas constitucionais albanesas e apresentá-las aos leitores no Brasil como opções disponíveis para combater a corrupção judicial.*

**Palavras-chave:** Reforma constitucional; Albânia; Brasil; Poder Judiciário; corrupção.

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**1. INTRODUCTION – THE CHALLENGE OF CONSTITUTIONAL REFORM**

Three simple but shocking facts demonstrate the depth of the corruption problem in Brazil: of the 65 members on the congressional commission that deliberated on President Dilma Rouseff's impeachment, 37 faced corruption or criminal charges of their own; 303 of Brazil's 513 congresspersons had been charged or were under investigation for serious crimes; and the same was true of 49 of the country's 81 senators.<sup>1</sup>

<sup>1</sup> BEVINS, Vincent., The Politicians Voting to Impeach Brazil's President are Accused of More Corruption than She is. **Los Angeles Times**, Los Angeles, 28 mar. 2016. Available at: < <http://www.latimes.com/world/mexico-americas/la-fg-brazil-impeach-20160328-story.html>>.

Corruption is, as Timothy Power and Matthew Taylor have written, ‘a troubling constant in the Brazilian political system, with instances of corrupt behavior readily apparent at the federal, state, and municipal levels and across all branches of government’.<sup>2</sup> This is not a recent phenomenon. Since the country’s transition to democracy, corruption has been a challenge for each presidential administration.<sup>3</sup>

The Brazilian judiciary has not escaped the corrupting influences in the region. A recent study has shown that courts in Brazil have been ineffective in combating corruption, finding that only 34 percent of all public officials dismissed in connection with corruption ever face criminal charges.<sup>4</sup> And even where public officials are charged, Brazilian courts convict them for corruption at very low rates.<sup>5</sup> Mariana Mota Prado and Lindsey Carson attribute these low conviction rates to plain error, onerous procedural rules and actual corruption inside the courts themselves.<sup>6</sup> Public trust in the Brazilian judiciary is unsurprisingly low. One public opinion poll found that 60 percent of Brazilians have little or no confidence in their judges.<sup>7</sup> There is no clear roadmap for how to curb corruption, especially judicial corruption, in Brazil. Prado and Carson diagnose the problem and hint at its intractability for political actors in search of a fix:

*[T]he ultimate sanctioning authority in Brazil remains the judiciary, which possesses the power to review and overturn punishments imposed by other entities. As a result, Brazilian courts hold a monopoly power over the sanctioning of corruption in the country.<sup>8</sup>*

Brazil is of course not the only country to confront the challenge of judicial corruption. One country whose challenges on this front are arguably even greater than Brazil’s is Albania, a former communist state that has struggled toward democracy since the collapse of the Soviet Union. Today Albania is a democratizing state with serious problems with judicial corruption.

<sup>2</sup> POWER, Timothy J.; TAYLOR, Matthew M. *Accountability institutions and political corruption in Brazil. Corruption and democracy in Brazil*. Indiana: University of Notre Dame Press, 2011. p. 1.

<sup>3</sup> *Ibid.* p. 2-3.

<sup>4</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service*. OECD Public Governance Reviews (OECD Publishing 2, 2012). p. 86.

<sup>5</sup> CARSON, Lindsey; PRADO, Mariana Mota. *Brazilian anti-corruption legislation and its enforcement: Potential lessons for institutional design*. IRIBA Working Paper: 09. Manchester. UK, 2014. Available at: <[http://www.brazil4africa.org/wp-content/uploads/publications/working\\_papers/IRIBA\\_WP09\\_Brazilian\\_Anti-Corruption\\_Legislation\\_and\\_its\\_Enforcement.pdf](http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP09_Brazilian_Anti-Corruption_Legislation_and_its_Enforcement.pdf)>. p. 18.

<sup>6</sup> *Ibid.*

<sup>7</sup> OECD ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD Integrity Review of Brazil: Managing Risks for a Cleaner Public Service*. OECD Public Governance Reviews (OECD Publishing 2, 2012). p. 87.

<sup>8</sup> See CARSON, Lindsey; PRADO, Mariana Mota. *Brazilian anti-corruption legislation and its enforcement: Potential lessons for institutional design*. IRIBA Working Paper: 09. Manchester. UK, 2014. Available at: <[http://www.brazil4africa.org/wp-content/uploads/publications/working\\_papers/IRIBA\\_WP09\\_Brazilian\\_Anti-Corruption\\_Legislation\\_and\\_its\\_Enforcement.pdf](http://www.brazil4africa.org/wp-content/uploads/publications/working_papers/IRIBA_WP09_Brazilian_Anti-Corruption_Legislation_and_its_Enforcement.pdf)>.

In 2015, two of us were appointed by the Hon. Fatmir Xhafaj, in his capacity as Chairman of the Special Parliamentary Committee on the Reform of the Judicial System in Albania, to serve as Consultants to the Committee as it deliberated on major constitutional reforms to the Albanian Constitution.<sup>9</sup> In the Spring of 2015, we were invited to submit written testimony on the official report entitled ‘Analysis of the Justice System in Albania’ and later in the Fall of 2015, we were again invited to make written submissions, this time delivered to the Office of the Technical Secretariat attached to the Ad Hoc Committee on Justice Reform on the ‘Draft Law on Amendments to the Constitution of the Republic of Albania.’

Political actors in Albania ultimately arrived at an agreement to pass sweeping constitutional reforms that dramatically altered the 1998 Constitution. The principal focus of the reforms was judicial corruption—how to spot it, how to stop it, and how to prevent its return. The reforms were adopted in July 2016 and entered into force in August 2016.<sup>10</sup> Too little time has elapsed since then to evaluate whether these reforms will fulfill their purposes. And certainly much too little time has passed for us to know whether the reforms in Albania can be applied with any confidence elsewhere in the world where similar problems with judicial corruption continue to undermine democratic norms of transparency and accountability, namely in Brazil. We nonetheless believe it is useful to explain the Albanian constitutional reforms and to introduce them to readers in Brazil as available options for combating judicial corruption.

The truth, however, is that any successful effort to curb judicial corruption in Brazil will require more than constitutional reform. For the same reason that an undemocratic country could not become a democracy overnight simply by adopting the constitution and inferior laws of any given democracy, for instance Norway or Ireland, Brazil cannot rid itself of judicial corruption by adopting measures deployed in another country, with its distinct political culture and history. The challenge of curb corruption is therefore less of a challenge of constitutional reform than one of politico-cultural reform that requires deep democratization beyond metrics like voter turnout.

We begin, in Part I, by exploring the problem of judicial corruption in Brazil. In Part II, we outline the problem of judicial corruption in Albania and, in Part III, we explain why and how Albanian political actors finally resolved to address this problem with a major constitutional reform in 2016. We conclude with thoughts on whether the Albanian reforms will be successful, and what its success or failure might mean for other countries in search of answers to corruption.

<sup>9</sup> Judge Klodian Rado and Professor Richard Albert served separately as Consultants.

<sup>10</sup> See Law 76/16, 22 July 2016, ‘On Some Amendments of the Law no 8417, 21 October 1998 on ‘The Constitution of Republic of Albania’ (Amended)’.

## 2. THE PROBLEM OF JUDICIAL CORRUPTION IN BRAZIL

Brazil, unlike Albania, has never known communist rule. The country did, however, live through a civil-military dictatorship from 1964 to 1985, not unlike many other countries in Latin America in that era. During that period, democratic institutions and the rule became even more eroded than they had already been as a result of the political and economic instability of the previous years.<sup>11</sup> Corruption was widespread and exacerbated by the lack of institutional transparency and accountability. Since Brazil's transition to a democratic constitution in 1988, institutional innovations and social improvements have helped generate relative political and economic stability.<sup>12</sup> Brazil has strengthened the rule of law, the judiciary has become more independent and checks on the separate branches of government have become real constraints on the exercise of their delegated powers, as a result of both institutional design and the creative energies of civil society.<sup>13</sup> Courts in particular have taken the leading role in pulling the country toward transparency and the rule of law, in the process becoming a guarantor of horizontal accountability while at the same time playing an increasingly central role in policy development.<sup>14</sup>

### 2.1. An Overview

And yet corruption remains a serious challenge today in Brazil. Among other upper-middle-income economies,<sup>15</sup> Brazil ranks particularly poorly, scoring only 40 on the Corruption Perceptions Index scale of 0 to 100, with 0 representing the highest levels of corruption.<sup>16</sup> Although the recent Petrobras<sup>17</sup> and Odebrecht<sup>18</sup> scandals have affected the ranking, the reality is that Brazil had not fared much better in previous years, scoring 42 in 2013, 43 in 2012 and 2014 and 38 in 2015.<sup>19</sup> Despite the popularity of

<sup>11</sup> BARBOSA, Leonardo Augusto de Andrade. **História Constitucional Brasileira: Mudança Constitucional, Autoritarismo e Democracia no Brasil Pós-1964**. Brasília: Edições Câmara, 2012.

<sup>12</sup> WEYLAND, K. The Growing Sustainability of Brazil's Low-Quality Democracy. In: HAGOPIAN, Frances; MAINWARING, Scott P. (Ed.). **The Third Wave of Democratization in Latin America: Advances and Setbacks**. Cambridge University Press, 2005. p. 90-94.

<sup>13</sup> HAGOPIAN, Frances. Paradoxes of Democracy and Citizenship in Brazil. **Latin American Research Review**, v. 46, n. 3, p. 216-227, 2011. p. 216-222; POWER, Timothy J.; TAYLOR, Matthew M. (Eds.). **Corruption and Democracy in Brazil**. Indiana: University of Notre Dame Press, 2011. p. 4.

<sup>14</sup> TAYLOR, Matthew M. **Judging Policy: Courts and Policy Reforms in Democratic Brazil**. Stanford University Press, 2008. p. 223.

<sup>15</sup> See World Bank Country and Lending Groups, online: <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>>.

<sup>16</sup> See TRANSPARENCY INTERNATIONAL. **Corruption Perception Index 2016**. Available at: <[http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016)>.

<sup>17</sup> See BEAUCHAMP, Zack. Brazil's Petrobras Scandal, explained. **Vox**, 18 mar. 2016. Available at: <<http://www.vox.com/2016/3/18/11260924/petrobras-brazil>>.

<sup>18</sup> See GALLAS, Daniel. Brazil's Odebrecht Corruption Scandal. **BBC**, 7 mar. 2017. Available at: <<http://www.bbc.com/news/business-39194395>>.

<sup>19</sup> See TRANSPARENCY INTERNATIONAL. **Corruption Perception Index 2016**. Available at: <<http://www.transparency.org/>>

individual judges, the judiciary as an institution is itself perceived as less than trustworthy, with only 29 percent of Brazilians expressing confidence in the judicial system.<sup>20</sup>

## 2.2. Two Types of Corruption

Two types of judicial corruption have revealed themselves in Brazil. We have seen ordinary corruption, meaning instances of bribery, embezzlement, influence peddling, patronage and nepotism. There is a great deal of anecdotal and empirical data on these and other incidents of ordinary corruption. These practices are symptomatic of a more structural cause of corruption in Brazil, a country with a long history of clientelism and limited checks on the judiciary. The relationship between law and politics has been shaped by clientelism and lax oversight of the judiciary.<sup>21</sup> To be sure, there has been some progress in reducing judicial corruption over the years but it has been minimal. Indeed, if the history of judicial corruption in Brazil proves anything it is that old habits die hard. Today, the judiciary remains an “eclectic mixture of judicial administration based on manifest indistinctness between public and private spheres.”<sup>22</sup>

In Brazil as in other democratizing states, the more deeply democracy takes root, the more difficult it becomes to carry out with much success the practices of ordinary corruption. It is here that the second type of corruption begins to gain ground. It is a more systemic and comprehensive form of corruption that is likewise “based on manifest indistinctness between public and private spheres.” Where ordinary corruption is defined by blatant breach of law, this more profound institutionalized corruption distorts the law and its democratic aspirations to shield itself from the external checks and norms required to curb corruption. Institutionalized corruption has complicated efforts to control it because its most powerful tool is the language of democracy: it commandeers principles like the separation of powers and judicial independence to strengthen judicial prerogatives and to shield the judiciary from intrusive oversight.

We can trace the roots of modern judicial corruption in Brazil to the Constituent Assembly of 1987-88. The judiciary succeeded in keeping its pre-democracy structures and functions virtually intact; there were few serious suggestions on reforming the judiciary.<sup>23</sup> The new Constitution formally conferred substantial authority and

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news/feature/corruption\_perceptions\_index\_2016>.

<sup>20</sup> See Fundação Getúlio Vargas – FGV. **Relatório ICJ Brasil, 1º Semestre/2016**. São Paulo: Escola de Direito de São Paulo da Fundação Getúlio Vargas (DIREITO GV), 2016. Available at: <[http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/17204/Relatorio-ICJBrasil\\_1\\_sem\\_2016.pdf?sequence=1&isAllowed=y](http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/17204/Relatorio-ICJBrasil_1_sem_2016.pdf?sequence=1&isAllowed=y)>.

<sup>21</sup> See ALMEIDA, Frederico Normanha Ribeiro de. **A Nobreza Togada: As Elites Jurídicas e a Política da Justiça no Brasil**. São Paulo, 2010. 329 f. Tese (Doutorado) – Faculdade de Filosofia, Letras e Ciências Humanas, Universidade de São Paulo.

<sup>22</sup> SILVEIRA, Daniel Barile da. **Patrimonialismo E Burocracia: Uma Análise Sobre O Poder Judiciário Na Formação Do Estado Brasileiro**. Brasília, 2006. 302 f. Dissertação (Mestrado) – Programa de Pós-Graduação em Direito do Estado, Universidade de Brasília. p. 20.

<sup>23</sup> KOERNER, Andrei. O Debate sobre a Reforma Judiciária. **Novos Estudos CEBRAP**, São Paulo, v. 54, 1999. p. 12.

independence to judges, enhanced the power and mechanisms of judicial review and entrenched new human rights—all liberal democratic features we would expect to see in the new charter of a nascent democratic state. But the reality is different: under the new Constitution, the judiciary—and particularly the Supreme Court—is functionally the same as it was under the civil-military dictatorship.<sup>24</sup> Today, under the new Constitution, the “old” judiciary exerts internal control on new judges and on their selection and promotion, as well as more generally on the administration of justice in the country.

The impetus at Brazil’s refounding to create democratic institutions resulted in vast powers for the judiciary. The Constitution makes courts practically untouchable in their administrative and financial autonomy,<sup>25</sup> the result being that its operations, relationships and resources are shielded from much political oversight.<sup>26</sup> With the constitutionally-entrenched protection to conduct its affairs free from public view, the judiciary under the constitutional design of 1988 could quite readily make substantial transfers of public resources to private benefit.<sup>27</sup> The Constitution’s protections for an independent judiciary ensures that there is little outside knowledge about the court’s inner workings and deliberations on decisions involving the allocation of resources, promotion of judges and the administration of the trial calendar. Against this backdrop, efforts to increase transparency and accountability occasion strong resistance from judges’ associations on the argument that these efforts are a smokescreen to curtail judicial independence, to decrease the courts’ powers and to remove checks on the political branches.<sup>28</sup>

Even the law that governs the rules and procedures for a career as a judge is from the pre-democracy period.<sup>29</sup> Enacted in 1979 during the military regime, the judicial career law proclaims judicial independence and creates rules that make it more than an empty declaration: judges enjoy life tenure, they are unremovable without cause and their remuneration cannot be reduced.<sup>30</sup> The law also assures benefits for judges that exceed those given to any other category of career civil servant—benefits for which there are only internal mechanisms of control.<sup>31</sup> The judicial career law furthermore sets out judicial duties and ethical guidelines, and it also outlines prohibitions

<sup>24</sup> KOERNER, Andrei; FREITAS, Lígia Barros de. O Supremo na Constituinte e a Constituinte no Supremo. **Lua Nova: Revista de cultura e política**, São Paulo, n. 88, p. 141-184, 2013.

<sup>25</sup> See Constitution of Brazil (1988), art. 99.

<sup>26</sup> See Koerner (n 23) p.12.

<sup>27</sup> See DA ROS, Luciano. O Custo da Justiça no Brasil: uma análise comparativa exploratória. **Observatório de elites políticas e sociais do Brasil**. NUSP/UFPR, v. 2, n. 9, p. 1-15, 2015. Available at: <<http://observatory-elites.org/wp-content/uploads/2012/06/newsletter-Observatorio-v-2-n-9.pdf>>.

<sup>28</sup> VEJA SÃO PAULO. A Reação dos Marajás, 21 dec. 2016. Available at: <<http://veja.abril.com.br/brasil/a-reacao-dos-marajas>>.

<sup>29</sup> BRASIL. Lei Complementar n. 35, de 14 de Março de 1979.

<sup>30</sup> BRASIL. Lei Complementar n. 35, de 14 de Março de 1979, art 45, I.

<sup>31</sup> *ibid.* at art 99.



and accompanying administrative sanctions for their violation.<sup>32</sup> However corruption cases have not yielded serious penalties for judges. A common administrative sanction has been forced retirement with the award of a proportionate wage based on years of service,<sup>33</sup> for some perhaps more of a reward than a penalty. Although indictments on corruption also ordinarily entail criminal charges, judges are very rarely prosecuted to the full extent of the law. Not satisfied, in the last years, the judiciary has even proposed changes on the legislation to both expand their privileges and make even more difficult external checks on its activities.<sup>34</sup>

### 2.3. The Challenges Ahead

There have nonetheless been efforts to curb judicial corruption. The most significant reform dates to 2004, when Brazilian Constitution was amended to create the National Council of Justice (CNJ).<sup>35</sup> This new institution is now responsible for overseeing the judicial system and both setting and enforcing high standards of transparency and efficiency. The CNJ has established rules requiring all courts and councils to publish information about their financial and budgetary management, any public tenders, their pay structure, as well as instructions for how to access even more information.<sup>36</sup> The CNJ has also undertaken to publish an annual report entitled **Justiça em Números** (“Justice in Numbers”), a new bank of data on judicial productivity, finance, human resources, management and performance, in addition to evaluative analysis of bottlenecks in the judicial process.<sup>37</sup> Another equally important innovation is the **Portal da Transparência** (“Transparency Portal”), easily accessible on the internet, where anyone can find daily updates on judicial budgets, including revenues and expenditures.<sup>38</sup> The role of CNJ is also investigative: it has examined allegations of fraud in connection with judicial selection and promotion, nepotism in court-related hiring, firing and advancement, and judicial remuneration.<sup>39</sup>

Despite the high expectations it raised for fighting judicial corruption, the CNJ has quite frankly failed to live up to its promise of being offering effective oversight

<sup>32</sup> *Ibid.* at art 35-48.

<sup>33</sup> *Ibid.* at arts 42, V.

<sup>34</sup> See KADANUS, Kelly. Proposta de nova Loman aumenta benefício dos magistrados, **Gazeta do Povo**, Curitiba, 5 jul. 2015. Available at: <<http://www.gazetadopovo.com.br/vida-publica/justica-e-direito/proposta-de-nova-loman-aumenta-beneficios-dos-magistrados-7davvag4n9gqj4688re0vboey>>.

<sup>35</sup> See BRASIL. Emenda Constitucional n 45, de 30 de Dezembro de 2004.

<sup>36</sup> Resolução n 102 de 15 de dezembro de 2009; Resolução n 151, de 05 de julho de 2012; Resolução n 215 de 16 de dezembro de 2015.

<sup>37</sup> CNJ. **Justiça em Números 2016: Ano Base 2015**. Brasília: CNJ, 2016. Available at: <<http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/b8f46be3dbbf344931a933579915488.pdf>>.

<sup>38</sup> See Portal da Transparência, online: <http://www.portaltransparencia.jus.br/despesas>.

<sup>39</sup> See CNJ. **Informativo de Jurisprudência - Coletânea das Decisões Atualizadas do CNJ**. Brasília: CNJ, 2014. Available at: <<http://www.cnj.jus.br/imagens/informativo-jurisprudencia/InformativoJurisprudencia.abril2014.pdf>>.

of the judiciary. Perhaps the clearest reason for its failure is its composition: the CNJ is staffed predominantly by judges.<sup>40</sup> Many of its members have led industry associations oriented toward defending the corporate interests of judges,<sup>41</sup> and even those who are said to represent civil society are closely connected to the political leadership.<sup>42</sup> It should therefore come as no surprise that the CNJ has consistently ruled in favor of the corporate interests of the judiciary instead of using its resources and platform to curb recurring abuses in and around courts. There is another factor of note: the CNJ has no formal authority over the Supreme Court, leaving this body virtually unreviewable altogether. For all of its promise, then, the CNJ is neither designed nor administered in a way that would inspire confidence in its capacity to do what it was intended to do: to create and deploy strategies to foster much needed accountability and transparency of the country's judicial system.

There is good news in this otherwise bleak portrait. Brazil has improved its mechanisms to counter or at least to address corruption, specifically judicial corruption. Although ordinary corruption still exists across the country, it is not the most difficult challenge. It is instead the more encompassing form of entrenched and systemic corruption that continues to do the most damage in the country. In order to make any real progress in fighting this form of corruption, Brazil needs a broader of the very concept of judicial corruption in addition to a clearer understanding of how its manifestations spring from the judiciary's capacity to innovative its own ways to insulate itself from external review while simultaneously expanding its authority. The great paradox of judicial corruption in Brazil is that democracy has brought greater formal accountability and transparency but it has also empowered the judiciary to exercise its institutional powers and prerogatives to defeat its functional ambition of reducing corruption.

### 3. THE PROBLEM OF JUDICIAL CORRUPTION IN ALBANIA

As bad as judicial corruption may be in Brazil, it is arguably worse in Albania. Political actors in the country have recently adopted a major package of constitutional reforms largely intended to curb judicial corruption. There are high expectations for the reforms but it remains too early to know whether they will succeed in ridding if not reducing incidents of corruption in courts. It is worth learning from the Albanian experience to see whether and how Brazil might benefit from the constitutional lessons Albania may have to share with the world.

<sup>40</sup> Among its 15 members, two are chosen by the Brazilian Bar Association, one by the House of Representatives, and one by the Federal Senate. The other 11 members are either judges (9) or members of the Prosecutor's Office (2).

<sup>41</sup> See FRAGALE FILHO, Roberto. Conselho Nacional de Justiça: desenho institucional, construção de agenda e processo decisório. *Dados – Revista de Ciências Sociais*, Rio de Janeiro, v. 56, n. 4, 2013. p. 981-983.

<sup>42</sup> *Ibid.* p. 987.

### 3.1. Albanian Courts Before 2016

Prior to the constitutional reform of 2016, Albania's judicial structure was a three-tiered system. Courts of first instance heard all types of cases—civil, criminal and administrative—with appellate courts hearing appeals directly from them. There were also courts dealing specifically with organized crime: a court of first instance and an Appeal Court of Serious Crimes. Finally, there was a High Court, the highest court in the hierarchy of the judicial structure. The High Court was divided into separate collegiums, each hearing appeals from appellate courts. Its jurisdiction was wide: it would hear corruption and criminal charges against the President, members of the executive and legislature, and judges of the High and Constitutional Courts. The High Court consisted of 17 judges appointed by the president with the consent of Parliament.<sup>43</sup>

For its part, the Constitutional Court stood outside of this judicial structure. Its primary duty was to guard the Constitution. Consisting of nine judges appointed the same way as their High Court counterparts,<sup>44</sup> the Constitutional Court's responsibilities included judicial review of national and subnational laws as well as international agreements. The Constitutional Court could also review the actions of the President and of parliamentarians.<sup>45</sup> There was a High Council of Justice (HCJ), otherwise known as the 'executive body of the judiciary' because it was responsible for all evaluations and promotions of first instance and appellate court judges. Two-thirds of the HCJ was proposed by the National Judicial Conference (NJC) and one-third earned its membership *ex officio* as representatives of the executive and legislature, namely the President, the chairman of the High Court, the Minister of Justice and three members elected by the Assembly. The NJC was known as the 'parliament' of judges; its members were selected in an election-like process and expected to defend the interests of the judges in the HCJ.<sup>46</sup>

Formally, the 1998 Albanian Constitution guaranteed judicial independence in terms of the administration of courts as well as their functions and financial security.<sup>47</sup> As to the judiciary's administrative functions, the Albanian Constitution stated quite clearly that the selection, nomination and promotion of justices would be governed by independent institutions such as the HJC, the NJC and the School of Magistrates. Judges were recruited from among graduates of the School of Magistrates,<sup>48</sup> an independent

<sup>43</sup> ALBANIA. Constitution of Albania (1998). Art. 141.

<sup>44</sup> *Ibid.* at art 124.

<sup>45</sup> *Ibid.* at art 131.

<sup>46</sup> *Ibid.* art. 147.

<sup>47</sup> *Ibid.* arts 135-147.

<sup>48</sup> The School of Magistrates is the only institution tasked with training future judges and prosecutors in Albania. To become a judge or prosecutor in Albania, persons must first be admitted to the School, which requires a bachelor of laws earned with distinction as well as a passing grade on a test given by the School. After acceptance to the School, admittees must complete a three-year full-time intensive theoretical and practical education in law in order to become a judge or prosecutor.

institution governed by a group of roughly 15 representatives from all corners of the legal community, only two of which were appointed by the Ministry of Justice.<sup>49</sup> The HCJ was entitled to recruit ten percent of the total number of judges among former judges who had not graduated from the School of Magistrates, assuming the fulfilled the eligibility requirements.<sup>50</sup> Under this judicial structure, judges could neither be tried nor prosecuted criminally without approval from the HCJ.<sup>51</sup> This package of safeguards was seen as the guarantor judicial immunity.

### 3.2. An Overview of Judicial Corruption

Studies from 2012 and 2014 show that courts in Albania are widely perceived to be the most corrupt public institution in the country.<sup>52</sup> The reason why surely includes a troubling lack of judicial independence and the widespread practice of bribery in the judiciary.<sup>53</sup> Judicial corruption has been a significant challenge in Albania's transition from communism to democracy since 1990, after 45 years of communism. Political actors purported to build democratic institutions—particularly during an intense period of institution-building between 1992 and 1998—but the executive branch sought with great success to control courts through both formal and informal strategies. Albania's low ranking on rule of law and transparency indicators reflects their success: Albania once had the worst rule of law ranking in the Western Balkans,<sup>54</sup> and it was only recently in 2016 that Albania moved from 110th to 83rd in Transparency International's Corruption Perception Index.<sup>55</sup> We should not be surprised that judicial independence in Albania has declined in recent years.<sup>56</sup> The point is clear, according to the European Commission: 'corruption remains prevalent in many areas and continues to be a serious problem'.<sup>57</sup>

<sup>49</sup> See Law no 8136, 31 July 1996 (amended by Law no 9414, dated 20 May 2005), "On the Magistrate School of the Republic of Albania", art 6.

<sup>50</sup> See Law no 9978, 18 February 2008, "On the Organization of Judicial Power in the Republic of Albania", art 11.

<sup>51</sup> ALBANIA. Constitution of Albania (1998). art 137.

<sup>52</sup> See SOUTH EAST EUROPEAN LEADERSHIP FOR DEVELOPMENT AND INTEGRITY. **2014 Report of South East European Leadership for Development and Integrity (SELDI): Anti-Corruption Reloaded: Assessment of South East Europe.** Available at: <[http://seldi.net/fileadmin/public/PDF/Publications/RAR/SELDI\\_RAR.pdf](http://seldi.net/fileadmin/public/PDF/Publications/RAR/SELDI_RAR.pdf)>. p. 83; TRANSPARENCY INTERNATIONAL. **Corruption Perception Index 2013.** Available at: <<http://www.transparency.org/gcb2013/report>>.

<sup>53</sup> See EUROPEAN COMMISSION REPORT. **Albania 2015 Progress Report.** Available at: <[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2015/20151110\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_albania.pdf)>.

<sup>54</sup> In a 2011 Freedom House report, Albania's judicial framework and independence fared worse than Montenegro and Macedonia, tied Croatia and Bosnia, yet performed better than Serbia and Kosovo. See Freedom House. **Nation in Transit 2011.** Available at: <[https://freedomhouse.org/sites/default/files/inline\\_images/NIT-2011-Release\\_Booklet.pdf](https://freedomhouse.org/sites/default/files/inline_images/NIT-2011-Release_Booklet.pdf)>.

<sup>55</sup> See TRANSPARENCY INTERNATIONAL. **Corruption Perception Index 2016.** Available at: <[http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016)>.

<sup>56</sup> See Freedom House. **Nation in Transit 2016: Albania.** p. 8. Available at: <[https://freedomhouse.org/sites/default/files/NIT2016%20Albania\\_1.pdf](https://freedomhouse.org/sites/default/files/NIT2016%20Albania_1.pdf)>.

<sup>57</sup> See EUROPEAN COMMISSION REPORT. **Albania 2016 Progress Report.** Available at: <[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_albania.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf)>.

### 3.3. Piecemeal Efforts to Combat Judicial Corruption

Prior to the major constitutional reforms of 2016, Albania took modest steps to curb judicial corruption. The Code of Judicial Ethics, introduced in 2000, has had virtually no impact.<sup>58</sup> Parliament passed a new law on judicial power in 2008 in order to strengthen judicial independence but courts did not become truly independent.<sup>59</sup> Parliament also passed a law on conflicts of interest for public officials, including judges.<sup>60</sup> Yet the European Commission found this law wanting, noting that ‘the law on conflicts of interest needs to be further clarified’.<sup>61</sup> Parliament thereafter revised the law in 2012 by strengthening the investigatory powers of the High Inspectorate for Declaration and Audit of Assets. In addition, six Joint Investigative Units (JIUs) were created to monitor economic crimes and corruption but they ‘have inadequate human resources and technical equipment, as do most investigation and law enforcement agencies’.<sup>62</sup>

From 2012-14, the Ministry of Justice undertook several reforms of its own. The most significant was lifting judicial immunity.<sup>63</sup> Even still, there were no cases of successful prosecution of judges after their immunity was lifted. The Ministry of Justice, together with the HCJ, opened hotlines for citizens to file claims of corruption. Whistle-blower protections were enhanced, and Parliament created a specialized anti-corruption body to increase transparency.<sup>64</sup> These and other reforms seem to have had little effect on Albanians’ perception of the judiciary, as judges are regarded as the most corrupt public officials,<sup>65</sup> and bribes continued to be paid in exchange for favorable decisions from prosecutors and judges.<sup>66</sup>

There are grave consequences to the massive scale of judicial corruption in Albania. It was one reason for postponing Albania’s request for accession to the European Union. Stefan Fule, the EU’s Enlargement Commissioner, declared in no uncertain terms in 2013 that ‘there are five key priorities which stand between Albania and accession talks:

<sup>58</sup> *Ibid.* p. 57.

<sup>59</sup> See Law no 9978, dated 18 February 2008, “On the Organization of Judicial Power in the Republic of Albania”.

<sup>60</sup> See EUROPEAN COMMISSION REPORT. **Albania 2007 Progress Report**. Available at: <[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2007/nov/albania\\_progress\\_reports\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2007/nov/albania_progress_reports_en.pdf)>.

<sup>61</sup> *Ibid.*

<sup>62</sup> See EUROPEAN COMMISSION REPORT. **Albania 2012 Progress Report**. Available at: <[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2012/package/al\\_rapport\\_2012\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/al_rapport_2012_en.pdf)>.

<sup>63</sup> See FREEDOM HOUSE REPORT. **Nations in Transit, Albania 2013**. Available at: <<https://freedomhouse.org/report/nations-transit/2013/albania>>.

<sup>64</sup> See EUROPEAN COMMISSION REPORT, *supra* note 57, p. 17.

<sup>65</sup> See ALBANIAN CENTER FOR ECONOMIC RESEARCH (ACER); SOUTH-EAST EUROPE LEADERSHIP FOR DEVELOPMENT AND INTEGRITY (SELDI). **Corruption Assessment Report: Albania**. Available at: <[http://selidi.net/fileadmin/public/PDF/Publications/CAR\\_Albania\\_2016/Raporti\\_i\\_Vleresimit\\_te\\_Korrupsionit\\_2016.pdf](http://selidi.net/fileadmin/public/PDF/Publications/CAR_Albania_2016/Raporti_i_Vleresimit_te_Korrupsionit_2016.pdf)>. p. 3.

<sup>66</sup> See GAN BUSINESS ANTI-CORRUPTION PORTAL. **Albania Corruption Report 2016**. Available at: <<http://www.business-anti-corruption.com/country-profiles/albania>>.

corruption, organised crime, judiciary, administrative reform, human rights.<sup>67</sup> The next year, the Council of Europe released a report on judicial corruption in Albania that highlighted concerns about ‘the reportedly high level of corruption in the judiciary which seriously impedes the proper functioning of the justice system and undermines public trust in justice and the rule of law in Albania.’<sup>68</sup> Albanians—and Albanian judges and prosecutors in particular—agreed that serious changes were necessary to finally do something about the pervasive corruption in courts. In 2014, over 90 percent of judges and prosecutors called for judicial reforms on a constitutional level to address this problem.<sup>69</sup>

## 4. CONSTITUTIONAL REFORM IN ALBANIA

Just last year in 2016 Parliament passed a major constitutional reform to address judicial corruption among other challenges facing public institutions.<sup>70</sup> The constitutional reform altered about one-third of the Albanian Constitution,<sup>71</sup> amending all existing judicial institutions and establishing new ones, resulting in significant changes to the judiciary and prosecution. With the support of the European Assistance Mission to the Albanian Justice System, the reform process began with a comprehensive analysis of the justice system, a detailed draft of a strategy and an action plan, and consultations with national and international experts.<sup>72</sup> A package of amendments was introduced in Parliament and thereafter approved; Albania is now endeavoring to implement the far-reaching judicial reforms. The reforms seek to address judicial corruption in three ways: by reforming existing judicial institutions, establishing new ones and vetting judges and prosecutors at all levels, including justices of the Constitutional Court.

### 4.1. Reforming Existing Judicial Institutions

Very little about the judiciary was left untouched by the 2016 constitutional reforms. The Constitutional Court, the High Court, the High Council of Justice and ordinary courts — all were affected by the reforms.

<sup>67</sup> FOX, Benjamin. Commission Backs Albania-EU Membership Talk. **EU Observer.com**, 16 oct. 2013. Available at: <<https://euobserver.com/enlargement/121805>>.

<sup>68</sup> See MUIŽNIEKS, Nils. **Report Following Visit to Albania**. p. 1. Available at: <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/dsee/dv/07/07en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/dsee/dv/07/07en.pdf)>.

<sup>69</sup> See OPEN SOCIETY FOUNDATION OF ALBANIA. **Survey: Judges and Prosecutors on Constitutional Reforms**. Bulletin no 3, July-September 2014. Available at: <[https://www.osfa.al/sites/default/files/press\\_03\\_law\\_bulletin.pdf](https://www.osfa.al/sites/default/files/press_03_law_bulletin.pdf)>.

<sup>70</sup> See Law 76/16, 22 July 2016, “On Some Amendments of the Law no 8417, 21 October 1998” on “The Constitution of Republic of Albania (Amended)”.

<sup>71</sup> Prior to the final Amendments, the Albanian Constitution had 174 articles. The reform introduced 47 articles that amended articles in the pre-reform constitution and also introduced completely new articles. In addition, a relatively long Appendix of an additional 10 articles was appended to the pre-reform constitution. See Law 76/16, 22 July 2016, “On Some Amendments of the Law no 8417, 21 October 1998 on ‘The Constitution of Republic of Albania’ (Amended)”.

<sup>72</sup> See EURALIUS – The European Assistance Mission to the Albanian Justice System. **Justice Reform**. Available at: <<http://www.euralius.eu/en/library/justice-reform>>.

As to the Constitutional Court, the reforms clarified its exclusive constitutional jurisdiction and enhancing its autonomy as to finance and administration.<sup>73</sup> Furthermore, the Constitutional Court's composition was changed; formerly composed of nine members appointed by the President with the consent of Parliament,<sup>74</sup> the Court is now composed of three members appointed by the President, three elected by the Parliament and three elected by the High Court.<sup>75</sup> The reforms also seek to thwart political favoritism, creating a new Justice Appointments Council to generate what aspires to be a meritocratic ranking of candidates for judgeship—a ranking that must not only be consulted but also honored when political actors appointment decisions.<sup>76</sup> All new appointees must be ranked among the Council's top three candidates.<sup>77</sup> One of the most important reforms to the Court is a change to Article 126, which used to read that “a judge of the Constitutional Court cannot be criminally prosecuted without the consent of the Constitutional Court”.<sup>78</sup> Now, Article 126 states that “the Constitutional Court judge shall enjoy immunity in connection with the opinions expressed and the decisions made in the course of assuming the functions, *except where the judge acts based upon personal interests or malice*”.<sup>79</sup> The exception based on ‘personal interests’ and ‘malice’ makes it possible to investigate Constitutional Court judges for corruption where the circumstances warrant.

The High Court, for its part, no longer has original jurisdiction to adjudicate criminal charges against the President, the Prime Minister, members of the Council of Ministers, parliamentarians and judges of the High Court and Constitutional Court.<sup>80</sup> That power has been transferred to specialized courts.<sup>81</sup> Prior to the reforms, the President, with the consent of Parliament, appointed members of the High Court.<sup>82</sup> Now its members are appointed for a non-renewable nine-year term by the President on the recommendation of the High Judicial Council.<sup>83</sup> This strictly limited term helps to avoid possible corruption in the nomination process. There is an important restriction

<sup>73</sup> Constitution of Albania, art 124(2)(3) (as amended).

<sup>74</sup> *Ibid.* p. art 125 (pre-amendment).

<sup>75</sup> *Ibid.* p. art 125(1) (as amended).

<sup>76</sup> Unlike the pre-amendment Constitution that allowed the Parliament to select Constitutional Court judges by a simple majority of all 140 MPs, now the Parliament ‘shall appoint the Constitutional Court judges by three-fifth majority of its members’. See *ibid.* p. art 125(2) (as amended), which also stipulates that in the interest of meritocracy, if the Parliament ‘fails to appoint the judges, within 30 days of the submission of the list of candidates by the Justice Appointment Council, the first ranked candidate shall be deemed appointed’.

<sup>77</sup> The Justice Appointments Council is a new constitutional institution that was created in the judicial reform. See *ibid.* at art 149(d) (as amended); *ibid.* at art 125(1).

<sup>78</sup> *Ibid.* at art 125 (pre-amendment).

<sup>79</sup> *Ibid.* at art 126 (as amended) [emphasis added].

<sup>80</sup> *Ibid.* at art 141(1) (pre-amendment).

<sup>81</sup> *Ibid.* at art 135(2) (as amended).

<sup>82</sup> *Ibid.* at art 136.

<sup>83</sup> *Ibid.* at art 136(1).

on eligibility for appointment: High Court judges are to be selected from those judges who have at least 13 years of experience as judges.<sup>84</sup>

The reforms have also renamed the High Council of Justice to the High Judicial Council (HJC).<sup>85</sup> This institution is seen in Albanian scholarship and jurisprudence as “the government of the judiciary”.<sup>86</sup> Its main role is to “ensure the independence, accountability and appropriate functionality of the judicial power in the Republic of Albania”.<sup>87</sup> Only six of its 11 members are judges;<sup>88</sup> the other five must have high moral and professional integrity, and at least 15 years of professional experience.<sup>89</sup> Of these five laypersons, “two lay members shall be elected from the advocates, two from the corps of law professors and the School of Magistrates and one shall be from civil society”.<sup>90</sup> Prior to the reforms, nearly all judges on the HJC promoted themselves to higher positions in the judiciary, despite the obvious conflict of interest.<sup>91</sup> Now, no judges on the HJC can be promoted during their period of service on members of the HJC. And to further depoliticize the HJC, the President and Minister of Justice no longer have seats on the Council. The HJC now oversees the justices of the High Court and it is itself overseen by the Constitutional Court, which can suspend or altogether dismiss any member of the HJC.<sup>92</sup>

Moreover, the 2016 constitutional reforms now require all judges to graduate from the School of Magistrates.<sup>93</sup> All judges must also survive an investigation into their personal assets and background before any appointment.<sup>94</sup> The purpose here is to disqualify those whose backgrounds raise questions about their integrity and likelihood to support the values of transparency and the public interest underlying the constitutional reforms. Another point is worth highlighting: prior to the reforms, judges served for life (with the exception of Constitutional and High Court judges), and neither their

<sup>84</sup> *Ibid.* at art 136(3). Yet according to this article one-fifth of the judges may be selected from among those renowned jurists with no fewer than 15 years of experience as advocates, law professors or lecturers, senior employees in the public administration or in some other practice of law.

<sup>85</sup> *Ibid.* at art 147.

<sup>86</sup> See SUBASHI, Armando. ‘Te Merren Masa ndaj KLD’. **Vizion Plus**, 26 nov. 2016, available at: <[http://www.dailymotion.com/video/x3fng0a\\_te-merren-masa-ndaj-kld-news-lajme-vizion-plus\\_tv](http://www.dailymotion.com/video/x3fng0a_te-merren-masa-ndaj-kld-news-lajme-vizion-plus_tv)>.

<sup>87</sup> ALBANIA. Constitution of Albania (1998). Art 147(1) (as amended). For a more detailed list of its constitutional responsibilities, see *ibid.* at art 147(a)(1) (as amended).

<sup>88</sup> See *ibid.* at art 147 (as amended).

<sup>89</sup> *Ibid.* at art 147(3) (as amended).

<sup>90</sup> *Ibid.* at art 147(4).

<sup>91</sup> In the period 1998-2004 almost all judge-members of the High Council of Justice elevated themselves within the judiciary. See RADO, Klodian. Prohibiting Conflicts of Interest within the High Council of Justice. **Shekulli**, n. 203, 26 jul. 2004 p. 4. This practice continued after 2004 until just before the constitutional changes. See: The Scandal, How Two Married Partners in HCJ Were Promoted, **Panorama**, Tirane, 17 dec. 2016. Available at: <<http://www.panorama.com.al/skandali-si-u-promovuan-dy-bashkeshortet-e-kld-se>>.

<sup>92</sup> ALBANIA. Constitution of Albania (1998). Art 147(c) (as amended).

<sup>93</sup> For more information on the School of Magistrates of Albania, see online: <<http://www.magjistratura.edu.al/?lang=2#55>>.

<sup>94</sup> ALBANIA. Constitution of Albania (1998). Art 136(a) (as amended).



pay nor benefits could be reduced.<sup>95</sup> The reforms now say nothing about judicial tenure and they permit changes to salary and benefits in some instances.<sup>96</sup>

## 4.2. Creating New Institutions

In addition to reforming existing institutions, the 2016 constitutional reforms to combat judicial corruption created several new permanent judicial institutions to help achieve this goal.

The office of the High Justice Inspector (HJI) was established to fight corruption and increase external accountability of judges at all levels. Article 147(d) of the amended Constitution states that ‘the High Justice Inspector shall be responsible for the verification of complaints against judges and prosecutors of all levels, members of the High Judicial Council, High Prosecutorial Council and Prosecutor General,’ and specifies that the HJI ‘shall also be responsible for inspecting the courts and prosecution offices as institutions.’<sup>97</sup> To reinforce external checks and to establish its impartiality, election to the HJI, for a single nine-year non-renewable term, requires a three-fifths vote in Parliament.<sup>98</sup> Its members can be disciplined and dismissed by the Constitutional Court.<sup>99</sup> The HJI does not on its own have the authority to dismiss or suspend judges and prosecutors. The only institution that has this authority of judges, with the exception of Constitutional Court judges, is the High Judicial Council.<sup>100</sup>

As previously mentioned, the Justice Appointments Council (JAC) is another new institution created in 2016. Its purpose is to establish a more meritocratic process for appointment. Composed of nine members selected by lot from the ranks of judges and prosecutors who are not involved in any disciplinary proceeding, the JAC’s members serve a one-year term.<sup>101</sup> The JAC’s role is to verify that candidates for the Constitutional Court and the High Justice Inspector position fulfill legal requirements for appointment as well as the equally important professional and moral criteria of competence and high character.<sup>102</sup> The JAC ranks candidates in an advisory ordering, though the ranking becomes binding where Parliament fails to reach a majority on a given appointment, in which case the candidate at the top of the JAC’s list is deemed appointed to fill the given vacancy.<sup>103</sup> The reforms also establish external checks and

<sup>95</sup> *Ibid.* at art 138 (pre-amendments).

<sup>96</sup> See *ibid.* at art 138 (as amended).

<sup>97</sup> *Ibid.* at art 147(d)(1)(2).

<sup>98</sup> *Ibid.* at art 147(d)(3).

<sup>99</sup> *Ibid.* at art 147(e).

<sup>100</sup> *Ibid.* at art 147.

<sup>101</sup> *Ibid.* at art 149(d).

<sup>102</sup> *Ibid.* at art 149(d)(1).

<sup>103</sup> *Ibid.*

balancing on the JAC, including the appointment of an ombudsperson to observe the selection by lot of members of the JAC as well as its meetings and official business.<sup>104</sup>

The 2016 constitutional reforms to combat corruption also yield new specialized courts to deal with corruption at the highest ranks of the judiciary, the legislature and the executive, including the President.<sup>105</sup> The judges on these specialized courts are appointed by the HJC but they may be removed only with a two-thirds vote of the HJC. Judges on these specialized courts have significant powers but they must still pass an investigation into their professional and personal background: 'The candidates for judges and judicial civil servant in the specialized courts, as well as their close family members, prior to their appointment, must successfully pass a review of their assets and their background and shall consent to periodic reviews of their financial accounts and personal telecommunications, in accordance with the law'.<sup>106</sup>

### 4.3. Transitional Vetting

A necessary first step in the implementation of these far-reaching Albanian judicial reforms is to establish a general vetting process for judges and prosecutors at all levels, including justices of the Constitutional Court.<sup>107</sup> Accordingly, a number of temporary institutions and procedures were established in connection with the 2016 judicial reform; they will expire at the completion of vetting process, which is scheduled to be completed within 9 years.<sup>108</sup>

One of the most controversial features of the Albanian judicial reform is the country's reliance on external actors—the International Monitoring Operation ('IMO')—not only in the actual drafting of the reforms but also in their implementation.<sup>109</sup> The International Monitoring Operation will run for nine years. Its main role is to appoint International Observers to help establish vetting institutions, to monitor their activity, and to give recommendations.<sup>110</sup>

Two of the vetting bodies are the Independent Commission of Evaluation (ICE) and the Appeal Chamber (AC). All judges and prosecutors must undergo assessments

<sup>104</sup> *Ibid.* at art 149(d)(3).

<sup>105</sup> *Ibid.* at art 135(2) (as amended).

<sup>106</sup> *Ibid.* at art 135(4).

<sup>107</sup> See ZHILLA, Fabian. Keshilli i Emerimeve ne Drejtesi, Skandali Antikushtetues. **Panorama**, 2 feb. 2017. Available at: <<http://www.panorama.com.al/keshilli-i-emerimeve-ne-drejtesi-skandali-antikushtetues>>.

<sup>108</sup> ALBANIA. Constitution of Albania (1998). Arts 178-83 (as amended).

<sup>109</sup> *Ibid.* at Annex art. B, 'International Monitoring Operation' (as amended).

<sup>110</sup> *Ibid.*

of their assets,<sup>111</sup> background,<sup>112</sup> and proficiency.<sup>113</sup> These assessments are external procedures conducted first by ICE and then by the AC, and each is supported and monitored by the IMO.<sup>114</sup> In order to avoid conflicts, no member of ICE or the AC may have been a judge, prosecutor, legal advisor or legal assistant in the two years prior to their nomination to serve on either body.<sup>115</sup> Both institutions, ICE and AC, are court-like bodies. Under Article 179(b)(6), each of these two bodies operates independently of the other. ICE members have the equivalent status of a High Court judge,<sup>116</sup> and members of the AC sit within the Constitutional Court as an independent branch<sup>117</sup> and have the status of Constitutional Court judges.<sup>118</sup> ICE consists of four permanent first-instance panels of three members each,<sup>119</sup> whereas AC consists of seven judges that decide matters in five-judge panels.<sup>120</sup> Under the supervision and recommendations of the International Observers, ICE and the AC possess the exclusive constitutional competence to suspend or dismiss any judge sitting on any court in Albania, including the Constitutional Court, as well as any prosecutors, including the General Prosecutor.<sup>121</sup> As a safeguard, the 2016 constitutional reforms have also created two Public Commissioners who 'shall represent the public interest and may appeal the decision of the Commission'.<sup>122</sup> In addition, consistent with the expectations of the Council of Europe and the European Union, the Albanian Constitution now recognizes the right of suspended or dismissed judges and prosecutors to appeal their sanction to the European Court of Human Rights.<sup>123</sup>

## 5. CONCLUSION — AN ALBANIAN STRATEGY FOR BRAZIL?

Since the Albanian constitutional reforms have only recently come into force it is too early to predict with any reliability whether they will succeed in achieving their high ambitions. Yet even at this early stage, a few doubts about their successful implementation have arisen.

<sup>111</sup> *Ibid.* at Annex art D.

<sup>112</sup> *Ibid.* at Annex art DH.

<sup>113</sup> *Ibid.* at Annex arts E.

<sup>114</sup> *Ibid.* at Annex art B(1)(2).

<sup>115</sup> *Ibid.* at Annex art C(5), 'General provisions for the Commission and Appeal Chamber'.

<sup>116</sup> *Ibid.* at Annex art C(3).

<sup>117</sup> *Ibid.* at art 179(b)(5). See Constitutional Court of Albania. Decision V-2/17, p. 60. Available at: <[http://www.gjk.gov.al/templates/NEModules/kerkesë\\_list/konsulto.php?id\\_kerkesë\\_vendimi=2376&language=Lng1](http://www.gjk.gov.al/templates/NEModules/kerkesë_list/konsulto.php?id_kerkesë_vendimi=2376&language=Lng1)>.

<sup>118</sup> ALBANIA. Constitution of Albania (1998). Annex art C(3) (as amended).

<sup>119</sup> *Ibid.* at Annex art C(1), 'General provisions for the Commission and Appeal Chamber' (as amended).

<sup>120</sup> *Ibid.* at Annex art F(1), 'Appeal Chamber'.

<sup>121</sup> *Ibid.* at Annex art E, 'Disciplinary Measures'; *ibid.* at Annex art F, 'Appeal Chamber'.

<sup>122</sup> *Ibid.* at Annex art C(2), 'General provisions for the Commission and Appeal Chamber'.

<sup>123</sup> *Ibid.* at Annex art F(8), 'Appeal Chamber'.

Perhaps the biggest challenge is determine who will judge the constitutionality of the new laws passed pursuant to the constitutional reform. This is a concern because the justices of the Constitutional Court are themselves subject to the vetting process. The question was put directly to the Constitutional Court. The Court prudently decided to request an *amicus curiae* brief from the Venice Commission.<sup>124</sup> The Commission concluded that these were 'extraordinary circumstances', and that the principle of necessity dictated that the Court should adjudicate the constitutionality of the Vetting Law despite its conflict of interest.<sup>125</sup> The Albanian Constitutional Court ultimately upheld the constitutionality of the Vetting Law.<sup>126</sup> And yet the vetting institutions themselves may in some cases be staffed by professionals who were part of the previous communist regime,<sup>127</sup> insofar the reforms require that persons appointed to these vetting bodies have previously served no fewer than fifteen years in a high office of law or public administration.<sup>128</sup> This is a difficult problem that attends to countries in transition.<sup>129</sup>

The constitutional reforms must also overcome resistance from judges and prosecutors, many of whom oppose the new vetting process. Immediately after the reforms entered into force, the national associations of judges and prosecutors objected to the vetting process,<sup>130</sup> and one of the judges' associations joined forces with the opposition party to initiate a constitutional challenge to the Vetting Law.<sup>131</sup> This is a significant obstacle standing in the way of real reform. Although these sweeping constitutional reforms had been adopted by a unanimous vote,<sup>132</sup> there was and re-

<sup>124</sup> See *ibid.* at para 14. The Venice Commission, formally known as *The European Commission for Democracy through Law*, is the Council of Europe's advisory body on constitutional matters. The President of the Albanian Constitutional Court had requested, in a letter dated 28 October 2016, an *amicus curiae* brief from the Venice Commission on whether Law no 24/2016 on the "Transitional Re-Evaluation of judges and Prosecutors in the Republic of Albania" ("the Vetting Law") conformed to international standards, including those reflected in the European Convention on Human Rights.

<sup>125</sup> See Venice Commission, 109th Plenary Session, 9-10 December 2016, **Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law)**, CDL-AD(2016)036-e, available at: <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)036-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e)>. The *amicus curiae* brief stated that "the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation. This situation could be considered by the Constitutional Court as an 'extraordinary circumstance' which may require departure from the principle of disqualification in order to prevent denial of justice". *Ibid.* p. 61.

<sup>126</sup> See Decision V-2/17, *supra* note 117.

<sup>127</sup> *Ibid.* at Annex art C(5), 'General provisions for the Commission and Appeal Chamber'.

<sup>128</sup> *Ibid.* at Annex art C(3), 'General provisions for the Commission and Appeal Chamber'.

<sup>129</sup> ZHILLA, Fabian. Procesi i "Vetting"-ut rrezikon te "ngrije". **Panorama**, 7 feb. 2017. Available at: <<http://www.panorama.com.al/procesi-i-vetting-ut-rrezikon-te-ngrije>>.

<sup>130</sup> See **Vetingu 'bashkon' gjyqtarët me PD, Unioni: Palë në Kushtetuese**. Tirane: Top Channel, 24 oct. 2016. Available at: <<http://top-channel.tv/lajme/artikull.php?id=338697>>; **Unioni i Gjyqtareve, Gati Ankimimi i Dyte ne Kushtetuese**, Tirane: Klan, 30 nov. 2016. Available at: <<http://tvklan.al/unioni-i-gjyqtareve-gati-ankimimi-i-dyte-ne-kushtetuese>>.

<sup>131</sup> See Decision V-2/17, *supra* note 117.

<sup>132</sup> See **Parlamenti Shqiptar Voton me 140 Vota Reformen ne Drejtesi**. Tirane: Radio Televizioni Shqiptar, 22 jul. 2016. Available at: <<http://rtsh.al/lajme/parlamenti-shqiptar-miraton-me-140-vota-reformen-ne-drejtesi>>.

mains pressure from political parties to keep their own judges in place without the careful vetting that the new reforms require—and also to appoint their own to the vetting bodies.

The role of International Monitoring Operation is therefore critical to the success of the constitutional reforms. The problem, however, is that its intrusive role in Albanian constitutional law and politics could be seen as undermining national sovereignty. Its role is different from the one played by Council of Europe and the European Union in Albania's constitutional reform: both of these international institutions were very involved in advising Albanian political actors during the drafting and adoption of the reforms. Their involvement was not without reason—Albania has an interest in demonstrating its willingness to meet their expectations because Albania is currently a candidate country for accession to the Union.<sup>133</sup> However the International Monitoring Operation will have oversight authority over the implementation of the reforms. How can a nation be sovereign if it subjects its internal procedures to external oversight? This, at least, is a collateral criticism raised by those opposed to the reforms. The Venice Commission has concluded that the involvement of these foreign actors—importantly with the consent of Albanian political actors—does not trample upon principles of national sovereignty.<sup>134</sup>

And so we are left with more questions than answers not only as to whether the reforms will succeed in Albania, but whether they suggest a way forward to curb judicial corruption in Brazil. One question, for Brazil, is whether political actors might accept advice from abroad to design strategies to combat judicial corruption and then, once adopted, to help enforce them. There are some possibilities for regional multi-lateral organizations that might play a role in Brazil similar to the one played by the Council of Europe, the European Union and now the International Monitoring Operation. One possibility is the Organization of American States (OAS) which incidentally held a ceremony recently in March 2017 to mark the twentieth anniversary of the ratification of the Inter-American Convention against Corruption.<sup>135</sup> If any external body can be seen as a legitimate actor in Brazilian domestic law and politics, it could well be the OAS.

<sup>133</sup> Albania became the 35th member state of the Council of Europe on 13 July 1995. See Council of Europe, "Albania— 47 States, One Europe", online: <<http://www.coe.int/ca/web/portal/albania>>. Albania has been an official candidate country for accession to the European Union since 24 June 2014. One of the requirements for eventual full membership in the Union is the harmonization of national laws with EU treaties, regulations and directives. See European Commission, European Neighbourhood Policy and Enlargement Negotiations – Albania. Available at: <[https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/albania\\_en](https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/albania_en)>.

<sup>134</sup> See Venice Commission, 105th Plenary Session, 18-19 December 2015, **Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania** at paras 9, 131, CDL-AD(2015)045-e, online: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)045-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)045-e); Venice Commission, 106th Plenary Session, 11-12 March 2016, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania (15 January 2016) at para 71, CDL-AD(2016)009-e, at para 71, online: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)009-e).

<sup>135</sup> ORGANIZATION OF AMERICAN STATES. **OAS Celebrates 20th Anniversary of the Inter-American Convention against Corruption**. 24 mar. 2017. Available at: <[http://www.oas.org/es/centro\\_noticias/comunicado\\_prensa.asp?sCodigo=AVI-025/17](http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=AVI-025/17)>.

Second, Brazilian political actors and the people must consider whether the answer to fighting judicial corruption rests in the creation of new public institutions or in the disinfection of its existing institutions. The answer in Albania was a combination of both. New institutions were created to oversee existing ones, and the existing ones were reconfigured with new safeguards against corruption. The risk with creating new institutions is that it will give corrupting influences new points of entry into the country's judicial process and infrastructure. Yet the risk with leaving existing institutions in place with no new oversight body is that little might change.

The third question is one that the Brazilian case highlights more than any other: is liberal democracy itself the problem? The great paradox in Brazil is that the march to liberal democracy has given corrupting influences an argument and an accompanying vocabulary to limit any intrusion into the judiciary, and consequently to combat judicial corruption. The watchwords of modern liberal democracy are powerful constitutional and rhetorical barriers to actions that might violate the 'separation of powers' or 'judicial independence', even if those actions might be useful to achieving the end of curbing judicial corruption in the larger service of democracy. The kinds of constitutional reforms that were recently introduced in Albania would be resisted in Brazil by corrupting influences both because they could possibly help fight corruption but also because they do indeed appear to compromise judicial independence and the separation of powers in the sense that they impose checks on what courts can do. And yet can there be any other way but introducing some oversight of courts—either internal or external—to fight corruption?

We have sought in this paper to explore a problem of huge proportions in Brazil: judicial corruption. In light of our experience as Consultants to the constitutional reform process in Albania just last year to address the very same problem of judicial corruption in that country, we have endeavored to explain the problem of judicial corruption in Albania and how political actors have tried to address it with far-reaching constitutional reforms. We have taken the further step of asking whether Albania's recent constitutional reform holds any lessons for Brazil as it confronts its own quite serious challenges with judicial corruption. We have no answer as to whether Albania's reforms could work in Brazil. We have instead outlined the Albanian strategy and moreover raised a series of modest questions that Brazilians must ask themselves if they wish to pursue meaningful constitutional reform to finally curb judicial corruption.

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